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ROSCOE'S DIGEST

OF THE

LAW OF EVIDENCE

ON THE TRIAL OF

Actions at Nisi Prius.

EIGHTEENTH EDITION.

BY

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OF

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PART II.—(*continued*).

EVIDENCE IN PARTICULAR ACTIONS—(*continued*).

ACTIONS ON SPECIALTIES.

ACTION ON COVENANTS RELATING TO LAND.

THE evidence in this action depends upon the particular breaches of covenant alleged by the plaintiff, and the mode in which they are stated or denied in the pleadings. A covenant is nothing more than an agreement expressed in an instrument in writing, executed as a deed. Such agreements, after proof of the deed in which they are contained, are subject to the rules of construction applicable to ordinary documents. As land is for the most part conveyed and leased by instruments under seal, certain covenants usually inserted in these instruments are frequently the subject of an action. The evidence necessary in the proof of a breach of several of the more important of these covenants will here be given.

Covenants in general.] There need be no formal words of covenant. Any words in a deed, showing an agreement to do a thing, make a covenant; as "that the lessee shall repair;" Com. Dig. Covenant. (A. 2). "It is agreed that A. shall pay B. for his goods," is a covenant by B. to deliver them to A., as well as by A. to pay. So, a lease by A. to B. "excepting a room and free passage to it," is a covenant by B. not to disturb the passage, but is not a covenant as to disturbing in the room. So, a covenant may be in the form of a proviso or condition. *Id.*; *Brookes v. Drysdale*, 3 C. P. D. 52; or of a recital; *Clark v. Clark*, 10 P. D. 188, C. A. Thus a recital of an intended fine in an agreement may amount to a covenant to levy one. *Furrall v. Hilditch*, 5 C. B., N. S. 840; 28 L. J., C. P. 221. So the recital in a lease of the intention of the parties that a mill should be erected, and a covenant to leave it in repair, amount in law to a covenant to erect it. *Sampson v. Easterby*, 9 B. & C. 505; 6 Bing. 644, Ex. Ch. But a conveyance by A. to a railway company of land, "intended to be formed into a new course" for a river, and a covenant by the company to make a bridge over the new cut for A.'s use, does not imply a covenant to make the new cut or divert the river. *Rashleigh v. S. E. Ry. Co.*, 10 C. B. 612. This case was, however, doubted in the House of Lords on an appeal, and was compromised. See *Knight v.*

Gravesend, &c., Waterworks Co., 2 H. & N. 6; 27 L. J., Ex., 73. An acknowledgment by A. in a deed that he owes B. £—, may be treated as a covenant to pay, if an intention to enter into an engagement to pay appear on the face of the deed; *Saunders v. Milsome*, L. R., 2 Eq. 573; *Brooks v. Jennings*, L. R. 1, C. P. 476; *Courtney v. Taylor*, 6 M. & Gr. 851; but not if the acknowledgment be merely for a collateral purpose; S. C.; *Holland v. Holland*, L. R., 4 Ch. 449; *Jackson v. N. E. Ry. Co.*, 7 Ch. D. 573. See also *Knight v. Gravesend, &c., Waterworks Co.*, *supra*. An indenture between A. and B. provided that A. should buy all the coal used by him from B., but that B. "should not be compelled to supply more than 500 tons per week," and in case of inability to supply "to the extent agreed upon," and notice thereof to A., A. might buy elsewhere: this was held to be a covenant by B. to supply coal to the extent of 500 tons unless unable from substantial cause. *Wood v. Copper Miners' Co.*, 7 C. B. 906. A covenant by the lessee of a coal mine to draw to, and deposit on the surface of the demised premises by some of the pits or shafts of the demised mine, for the use of the lessor, all the manure made underground, does not imply a covenant by the lessee to make pits or shafts on the demised land, although such pits may have been contemplated by both parties. *James v. Cochrane*, 7 Exch. 170; 21 L. J., Ex. 229; Ex. Ch., 8 Exch. 556; 22 L. J., Ex. 201.

By the 8 & 9 V. c. 106, s. 4, in deeds executed since the 1st October, 1845, the word "give" or "grant" shall not imply any covenant in respect of real property, except by force of some Act of Parliament (such as by the Lands Clauses Consolidation Act, 1845, s. 132). This is in reference to the old authorities by which covenants were implied from the words "give," "grant," and "demise." Com. Dig. Covenant, (A. 4). The former Act does not restrain the effect of the word "demise," which still implies a covenant for title, but such implied covenants are restrained by express covenants contained in the same deed and incompatible with them; for *expressum facit cessare tacitum*; *Shep. Touch.* cap. 7, p. 165. *Vide post*, p. 748. By virtue of the Conveyancing, &c. Act, 1881, 44 & 45 V. c. 41, s. 6, general words are, so far as a contrary intention is not therein expressed, now implied in conveyances; and also by sect. 7, covenants for title, *vide post*, p. 745. See also sects. 49—64 containing provisions as to the construction and effect of deeds and other contracts.

The following are some of the most material issues arising in actions on deeds and bonds generally:—

Defences denying execution of deed.] By Rules, 1883, O xix., r. 20, *ante*, p. 310, under this defence, which now in part takes the place of the old plea of *non est factum*, the plaintiff need only produce and prove the execution of the deed. As to the proof of the execution of corporation deeds, *vide ante*, p. 131; of private deeds, *ante*, pp. 132 *et seq.* Where the action is not for any liquidated sum, it is also necessary to prove the amount of damage.

Formerly, where a deed was pleaded according to its supposed legal effect, *non est factum* put in issue not only the execution of it, but the legal effect as stated. *North v. Wakefield*, 13 Q. B. 536. The plea in such a case, in effect, denied execution of any deed, corresponding with the one described in the count. But where the deed was recited *verbatim*, the construction was for the court on demurrer, and *non est factum* only denied the execution, or the accuracy of the transcript of the deed set forth. *Semb.* S. C. Where a deed was executed by A. without negligence, he being deceived as to the document he was executing, its invalidity is raised under *non est factum*. *Bagot v. Chapman*, 23 T. L. R. 562, May 16th, 1907, *cor.* Swinfen Eady, J. See also *Foster v. Mackinnon*, L. R., 4 C. P. 704, *ante*, p. 392. But "where a man knows that he

is conveying or doing something with his estate, but does not ask what is the precise effect of the deed, because he is told that it is a mere form, and has such confidence in his solicitor as to execute the deed in ignorance, then in my opinion a deed so executed, although it may be voidable on the ground of fraud is not a void deed." *Hunter v. Walters*, L. R., 7 Ch. 88, per Mellish, L.J.; acc. *King v. Smith*, (1900) 2 Ch. 425, 430; *Nat. Provincial Bank of England v. Jackson*, 33 Ch. D. 1, C. A.; *Howatson v. Webb*, (1907) 1 Ch. 537. And where the defendant has executed a deed, the contents of which he knew, he cannot under *non est factum* prove that he was induced to execute it by fraudulent representations. *Onward Building Soc. v. Smithson*, (1893) 1 Ch. 1, C. A.

Under special defences the defendant may show that the deed was executed as an escrow, and was to take effect as a deed only upon some given event which has not happened; or that the deed, after being sealed, was tendered to the covenantee, and he expressly rejected it; *ante*, p. 137; or in the case of a corporation deed, irregularity, or want of due authority in the execution of the deed; *ante*, p. 131.

If the seal, other than that of the defendant, be removed, the deed may be given in evidence, if it be a several deed; *Matthewson v. Lydiate*, 5 Rep. 22; Cro. Eliz. 408; *contra*, if it be a joint or joint and several deed. *Id.*; *Seaton v. Henson*, 2 Lev. 220.

Where a bond is produced at the trial in a cancelled state, *e.g.*, with the seal broken off, the question seems to be whether the bond was cancelled before or after defence pleaded. *Nicholls v. Haywood*, Dyer, 59 a; *Michael v. Scockwith*, Cro. Eliz. 120; *Whelpdale's case*, 5 Rep. 119; and see *Todd v. Emly*, 11 M. & W. 1. But the party relying on the deed may show that the seal was removed under circumstances not amounting to a cancellation. *Vide ante*, pp. 661 *et seq.*

If a bond be sealed and delivered to a man's use, and he die before notice, his executors may sue upon it. Dyer, 167.

In an action by lessor, on covenants contained in a lease under seal, and which depend on the existence of the term, as, for instance, those to repair and pay rent during the term, the defendant may set up as a special defence that the lease had not been executed by the lessor. *Swatman v. Ambler*, 8 Exch. 72; 22 L. J., Ex. 81; *Pitman v. Woodbury*, 3 Exch. 4. *Quære*, if he can do so after he has entered and occupied during the term. *Vide S. C. and Cooch v. Goodman*, 2 Q. B. 580. If the defendant got all the title he stipulated for, an informality in the execution by the lessors will not affect the lessee's covenants. *How v. Greek*, 3 H. & C. 391; 34 L. J., Ex. 4; *Toler v. Slater*, L. R., 3 Q. B. 42. And such a defence is not applicable to a covenant to invest money contained in a mortgage deed, which the mortgagor alone executed. *Morgan v. Pike*, 14 C. B. 473; 23 L. J., C. P. 64.

The lease may be proved *primâ facie* by producing the counterpart executed by the defendant, without notice to produce the original lease. *Houghton v. König* 18 C. B. 235; 25 L. J., C. P. 218. But the defendant may put in the original lease, and show that it is void by reason of the non-execution thereof by the lessor. *Wilson v. Woolfryes*, 6 M. & S. 341; see further, *supra*. Where there is a discrepancy between the two instruments the lease shall prevail; Sheppard's Touchstone, 52; unless the lease only is inconsistent with itself, in which case reference may be made to the counterpart, to ascertain and correct the mistake. *Burchell v. Clark*, 2 C. P. D. 88, C. A. But generally where an indenture is in two parts, one party executing each part, if there is a material variation between the two parts, the indenture is void for want of mutuality. *Wynne's case*, L. R., 8 Ch. 1002.

Where one of several covenantees sued as sole covenantee without joining

the others or showing their death, this was formerly a variance on a plea denying the contract; but if one of several joint covenantors were sued without naming or joining the rest, this was only pleadable in abatement; 1 Wms. Saund. 154, a, (1). A covenant by A., B., and C., that they or some of them will pay, &c., may be sued as on a covenant by any one of them. *Caldwell v. Beeke*, 2 Exch. 318.

A question formerly arose under a denial of the contract, or other appropriate defence, whether the plaintiffs who sued were the proper parties to the action. Where the covenant is with A. and B. jointly, yet if the interest of each is several, as on a conveyance of distinct lands by each, they could not join as plaintiffs: 1 Wms. Saund. 154 (1); although they can now do so under Rules, 1883, O. xvi., r. 1, *ante*, p. 89. But if the covenant is expressly made to several, though for the benefit of one only, it is a joint covenant and all should join. *Anderson v. Martindale*, 1 East, 497. The rule, as expressed in the latest cases, is that where the covenant is to or with several persons, it will be construed to be joint or several, according to the interest of the covenantees apparent in the deed, provided that the words admit of such construction. But if the covenant be expressly and unambiguously a joint one, then the interest will not control the construction, and all the covenantees must join. *Sorsbie v. Park*, 12 M. & W. 146; *Hopkinson v. Lee*, 6 Q. B. 964; *Haddon v. Ayers*, 1 E. & E. 118; 28 L. J., Q. B. 105; *Palmer v. Mallet*, 36 Ch. D. 411; *White v. Tyndall*, 13 Ap. Ca. 263, D. P.

The benefit of an indivisible covenant, *e.g.*, to repair or work mines, on a joint demise by tenants in common, runs with the entire reversion only; and therefore all the covenantees or their representatives must join in suing on a breach of the covenant. *Thompson v. Hakewell*, 19 C. B., N. S. 713; 35 L. J., C. P. 18; following *Foley v. Addenbrooke*, 4 Q. B. 197; and on the authority of Litt., s. 314; Co. Litt. 196 b; see also *Bradburne v. Botfield*, 14 M. & W. 559; *Wakefield v. Brown*, 9 Q. B. 209; *Keightley v. Watson*, 3 Exch. 716; *Magnay v. Edwards*, 13 C. B. 479; *Pugh v. Stringfield*, 3 C. B., N. S. 2; 27 L. J., C. P. 34. It would seem that if the covenant, in such a lease, were to pay a money or other divisible rent, the tenants in common or their representatives might maintain separate actions for their respective shares of the rent. See *Thompson v. Hakewell*, *supra*. Where the reversion expectant on the determination of a lease vested in tenants in common A., B., and C., it was held that A. could by himself sue the lessee for breach of a covenant in the lease. *Roberts v. Holland*, (1893) 1 Q. B. 665. *Sed quere*, the covenant in this case being to deliver up the premises in good repair. *Ex rel. amici*.

The Rules, 1883, O. xvi., as to nonjoinder and misjoinder of parties, will be found *ante*, pp. 90, 91. It seems that under them, objection to the nonjoinder of a plaintiff must be taken before the trial. See cases cited *ante*, p. 91, and *Werderman v. Société Générale d'Electricité*, 19 Ch. D. 246, C. A., where, however, the judgment of Jessel, M.R., was based (*vide Id.* 251) on an erroneous view of the practice at common law. *Vide Thompson v. Hakewell*, *supra*.

The insertion of more covenantors than ought to be joined is now immaterial. *Vide ante*, pp. 90, 91. Where the action is on an implied covenant, persons who are parties to the deed, only for confirmation, with no legal estate (as where trustee and *cestui que trust* join as lessors), should not be joined as defendants. *Smith v. Pocklington*, 1 C. & J. 445. Whether, in an action by assignees of the reversion on express covenants, it is proper to join as co-plaintiffs persons who have no legal interest in the reversion, is a question not yet at rest: see *Wakefield v. Brown*, and *Magnay v. Edwards*, *supra*.

At common law, no person not made, by name or description, a party to an indenture could sue thereon. Com. Dig. Fait, (D. 2); *Chesterfield, &c., Colliery Co. v. Hawkins*, 3 H. & C. 677; 34 L. J., Ex. 121; *Kitchin v. Hawkins*, L. R., 1 Q. B. 22. But now, on equitable principles, a person having a beneficial right thereunder, as *cestui que trust*, may sue thereon. *Gandy v. Gandy*, 30 Ch. D. 57, C. A. And by 8 & 9 V. c. 106, s. 5, under an indenture executed after Oct. 1st, 1845, "the benefit of a condition or covenant, respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture." Where the lessee of a house is trustee for W., W. is not liable on the covenants of the lease, although W. occupies. *Ramage v. Womack*, (1900) 1 Q. B. 116.

Covenant to pay money] On a covenant by A. to pay B. a sum of money, A. is bound to seek out B. "if he be *infra regnum Angliæ*; but if he be not within the kingdom, he is not bound to seek him." Sheppard's Touchstone, cap. 6, p. 136. Where, however, the payment is to be at a certain place, a demand for payment must be made at that place. *Thorn v. City Rice Mills*, 40 Ch. D. 357; and see further *post*, p. 731. Where two places are named for payment, there is no default until the payee has selected the place, and made demand there. S. C.

Alteration of deed.] The cases relating to the alteration of deeds are collected with those relating to simple contracts, *ante*, pp. 661 *et seq.*

Fraud.] *Vide ante*, pp. 663 *et seq.*

Payment under covenant, &c.] *Vide ante*, p. 693.

Statutes of Limitation to actions on specialty.] The Limitation Act, 1623, 21 J. 1, c. 16, *ante*, p. 678, did not apply to deeds or specialties. The statutes applying to such instruments are 3 & 4 W. 4, c. 27, 42; 19 & 20 V. c. 97; 37 & 38 V. c. 57; and 51 & 52 V. c. 57.

By the Real Property Limitation Act, 1833, 3 & 4 W. 4, c. 27, the limitation of actions for rent, and annuities and other periodical sums charged upon or payable out of land, is regulated.

By sect. 42, "no arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable or his agent; provided, nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years."

By the Real Property Limitation Act, 1874 (37 & 38 V. c. 57), which (sect. 12) came into operation on Jan. 1st, 1879, sect. 8, "no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within 12 years next after a present right to receive the same shall have accrued to

some person capable of giving a discharge for, or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within 12 years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one was given." By sect. 10, "no action, suit, or other proceeding shall be brought to recover any sum of money or legacy, charged upon, or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable, and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust." See *Hughes v. Coles*, 27 Ch. D. 231; *In re Stephens*, 43 Ch. D. 39; *In re Hartley*, (1900) 1 Ch. 152. As to the meaning of "an express trust," *vide post*, p. 1077.

Sects. 8 (*ante*, p. 719) and 9 replace 3 & 4 W. 4, c. 27, s. 40, under which section the period of limitation was 20 years instead of 12.

By 23 & 24 V. c. 38, s. 13, the period of limitation for claims in respect of the share of the estate of an intestate, made against his personal representative, is 20 years. See *In re Johnson*, 29 Ch. D. 964; *Willis v. El. Beauchamp*, 11 P. D. 59, C. A.; and *In re Pardoe*, (1906) 1 Ch. 265.

By the Trustee Act, 1888 (51 & 52 V. c. 59), s. 8, *ante*, p. 680, actions against trustees are now in some cases subject to Statutes of Limitations, and in the case of an action against a trustee and executor the question often arises as to whether the claim falls within that section or 37 & 38 V. c. 57 ss. 8, 10, *supra*. See *In re Timmins*, (1902) 1 Ch. 176, and cases there cited.

The stat. 37 & 38 V. c. 57, s. 8, applies to the sums payable under stat. 42 G. 3, c. 116, ss. 123, 125, to the person who has redeemed the land tax, in respect of the tax so redeemed. *Skene v. Cook*, (1902) 1 K. B. 682, C. A. A "present right to receive" is not equivalent to a "present right to enforce payment;" thus where improvement works have been done in a street, the cost of which is to be apportioned among the owners of the houses forming the street, and the apportioned shares are payable by the respective owners, and made a charge on their houses, the statute runs although there has been no apportionment. *Hornsey Local Board v. Monarch Investment Building Soc.*, 24 Q. B. D. 1, C. A. See *In re Owen*, (1894) 3 Ch. 220, and *In re Pardoe*, *supra*.

A payment to prevent the barring by stat. 37 & 38 V. c. 57, s. 8, must be an acknowledgment, by the person making the payment, of his liability, and an admission of the title by the person to whom it is paid. *Harlock v. Ashberry*, 19 Ch. D. 539, C. A. It must be made by the person liable to pay principal or interest; payment of rent by the tenant of the mortgaged property to the mortgagee, in pursuance of notice by him, is no bar. S. C. See also *Newbould v. Smith*, 33 Ch. D. 127, C. A., affirmed on another ground in D. P. 14 Ap. Ca. 423; and *In re Ld. Clifden*, *infra*. Payment by a person bound to pay as between himself and the mortgagor only, is sufficient. *Bradshaw v. Widdrington*, (1902) 2 Ch. 430, C. A. So *primâ facie* is payment by a solicitor acting for both the mortgagor and mortgagees. S. C. Payment of part of the amount due under a judgment, under a judgment thereon obtained in a foreign court, does not affect the bar under sect. 8. *Taylor v. Hollard*, (1902) 1 K. B. 676. Assuming that sect. 8 applies to an action brought on a mortgage deed, against a surety, payment of interest by the mortgagor prevents the section operating as a bar. *In re Frisby*, 43 Ch. D. 106, C. A. It is, however, doubtful whether the section applies to such an action. *Vide* S. C.; *In re Powers*, 30 Ch. D. 291 C. A.

Where rent out of which the interest of the mortgage ought to be paid is receivable by, and belongs to the same person who is entitled to the interest, the statute does not bar the mortgagee. *Topham v. Booth*, 35 Ch. D. 607. The above cases were distinguished in *In re England*, (1895) 2 Ch. 100, 820, C. A. Where the receiver appointed by the court to receive the rents of three estates, A., B., and C., included in one mortgage, entered into possession of C. only, and out of the rents paid the mortgage interest, this was held to be in law payment by the mortgagor in respect of the mortgage debt, and prevented the statute from operating. *Chinnery v. Evans*, 11 H. L. C. 115; see also *Cronin v. Dennehy*, 1 R., 3 C. L. 289, C. P.; and *Lewin v. Wilson*, 11 Ap. Ca. 639, J. C. A payment made after 12 years from the accruing of the debt, but within 12 years before action, bars the statute. *In re Ld. Clifden*, (1900) 1 Ch. 774, 778.

A debt charged on personal estate by vendor's lien is not barred by any statute of limitations, and is at any time recoverable with interest from its date. *In re Stuclej*, (1906) 1 Ch. 67, C. A.

By the Civil Procedure Act, 1833, 3 & 4 W. 4, c. 42, the period of limitation in actions of debt on specialty, and in some other actions, is defined. By sect. 3, it is enacted, that all actions of *debt for rent* upon an indenture of demise, all actions of *covenant or debt upon any bond*, or other *specialty*, and all actions of *debt or scire facias upon any recognizance*, shall be sued or brought within 20 years after the cause of such actions or suits, but not after; provided, that nothing herein contained shall extend to any action given by any statute, where the time for bringing such action is or shall be by any statute specially limited.

By sect. 4, provision is made for persons who are, at the time such cause of action accrued, within the age of 21 years, covert, of unsound mind, or *beyond the seas*; such person to be at liberty to bring the actions, so as they commence the same within such times after their coming to, or being of full age, discover, of sound memory, or *returned from beyond the seas*, as other persons having no such impediment should, according to the provision of the Act, have done; and if any person against whom there shall be any such cause of action, shall be, at the time of cause of action accrued, beyond the seas, then the person entitled shall be at liberty to sue such person within the times before limited after the return of such person from beyond the seas. [As to the words in italics, *vide* 19 & 20 V. c. 97, *infra*.]

Sect. 5. Provided that, if any acknowledgment shall have been made either by writing signed by the party liable by virtue of such indenture, specialty or recognizance, or his agent, or by part payment, or part satisfaction on account, of any principal or interest then due thereon, it shall be lawful for the person entitled to such action to bring his action for the money remaining unpaid, and so acknowledged to be due, within 20 years after such acknowledgment or part payment or part satisfaction; or in case the person entitled to such action shall, at the time of such acknowledgment, be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making it, beyond the seas, then within 20 years after the disability shall have ceased, or the party shall have returned from beyond the seas, as the case may be; and the plaintiff in such action may, by way of replication, state such acknowledgment, and that the action was brought within the time aforesaid, in answer to a plea of this statute.

Sect. 7. No part of the United Kingdom, nor the Isle of Man, nor the Channel Islands, being dominions of the Queen, are to be deemed beyond seas within the meaning of this Act.

By 19 & 20 V. c. 97 (already cited *ante*, p. 683), s. 10, no person or persons entitled to any action limited by the Acts 3 & 4 W. 4, c. 27, s. 42 (*ante*, p. 719), or *Id.* c. 42, s. 3 (*supra*), shall be entitled to any further time

to sue by reason only that such person, or one or more of such persons, was or were beyond seas at the time when the cause accrued; and by sect. 11, in case of joint debtors, no further time is to be allowed for suing, by reason only that some of them were beyond seas when the cause accrued; but a judgment recovered in such case will not *per se* be a bar to an action against the absent debtor or debtors after their return. Sect. 14 (cited *ante*, p. 687) also provides that part payment by one debtor shall not deprive his co-debtor of the benefit of the statute.

By the J. Act, 1873, s. 25 (2), no claim by a *cestui que trust* against his trustee on an express trust is to be barred by any Statute of Limitations. See, however, 37 & 38 V. c. 57, s. 10, *ante*, p. 720, and 51 & 52 V. c. 59, s. 8, *ante*, p. 680. But although the claim is not barred by the statute, yet where there has been laches on the part of the plaintiff, his remedy may be limited to six years' arrears of interest. *Thomson v. Eastwood*, 2 Ap. Ca. 215, D. P. See further, *ante*, p. 681.

The effect of the 3 & 4 W. 4, c. 27, s. 42, and c. 42, s. 3, together, is that no more than six years' arrears of rent or interest in respect of any sum charged on, or payable out of, any land or rent shall be recovered by way of distress, action, or suit, other than and except an action of covenant or debt on the specialty, in which case the limitation is 20 years. *Paget v. Foley*, 2 N. C. 679; *Sims v. Thomas*, 12 Ad. & E. 536; *Grant v. Ellis*, 9 M. & W. 113; *Manning v. Phelps*, 10 Exch. 59; 24 L. J., Ex. 62; *Bowyer v. Woodman*, L. R., 3 Eq. 313. Where however the lessor's title has been extinguished under 3 & 4 W. 4, c. 27, s. 34, *post*, p. 1069, the right to recover arrears of rent has also gone. *In re Jolly*, (1900) 2 Ch. 616, C. A.

Now, by 37 & 38 V. c. 57, s. 8, *ante*, p. 719, in an action on the covenant in a mortgage deed, to pay the mortgage debt, the period of limitation has been reduced to 12 years; *Sutton v. Sutton*, 22 Ch. D. 511, C. A.; so in an action on a bond given as collateral security with a mortgage; *Fearnside v. Flint*, *Id.* 579; even although the mortgage is on a reversion, which had not fallen into possession at the date of the writ. *Kirkland v. Peatfield*, (1903) 1 K. B. 756; and so in an action on a judgment; *Hebblethwaite v. Peever*, (1892) 1 Q. B. 124; *Jay v. Johnstone*, (1893) 1 Q. B. 25, 189, C. A.; even although a suggestion had, within 12 years, been entered on the roll under C. L. P. Act, 1852, s. 129. *Ex pte. Tynte*, 15 Ch. D. 125. But an action on a bond given by A. to C., conditioned to secure the payment of principal and interest due under B.'s mortgage to C., is not within sect. 8. *In re Powers*, 30 Ch. D. 291, C. A. Where J. and A. entered into a joint and several covenant in a mortgage deed to pay the sum of 3,000*l.* and interest on demand, J. joining as surety for A., the statute did not begin to run in favour of J. until a demand for payment had been made on him, the claim being collateral. *Brown v. Brown*, (1893) 2 Ch. 300.

Dividends declared on the shares of a company registered under the Companies Act, 1862, the certificate of which is under the seal of the company, are recoverable within 20 years from the date on which they were payable; *In re Artizans' &c. Cor.*, (1904) 1 Ch. 796; and capital to be returned on the shares is recoverable from the date of the notice of the order confirming the resolution. S. C. In the case of a company under the Companies Clauses Acts, 1845, 1863, interest due on debenture stock issued thereunder, is recoverable within 20 years. *In re Cornwall Minerals Ry. Co.*, (1897) 2 Ch. 74. And the same rule would seem to apply to dividends payable on shares of such company, S. C.; *In re Severn &c. Bridge Co.*, (1896) 1 Ch. 559, and *In re Artizans' Land &c. Cor.*, *supra*.

An action to recover a simple contract debt, charged on land, is still barred under 21 J. 1, c. 16, by the lapse of six years. *Burnes v. Glenton*, (1899) 1 Q. B. 885, C. A.

The 3 & 4 W. 4, c. 27, s. 42 (*ante*, p. 719), does not affect the right of a mortgagee to retain out of the proceeds of the mortgaged property for more than six years' interest. *In re Marshfield*, 34 Ch. D. 721; *Dingle v. Coppen*, (1899) 1 Ch. 726; *In re Lloyd*, (1903) 1 Ch. 385, C. A.

As to what cases fall within the stat. 3 & 4 W. 4, c. 42, s. 3, and what within stat. 21 J. 1, c. 16, s. 3, *vide ante*, pp. 678, 679.

As to the applicability of the Statutes of Limitations to breaches of covenants for title, *vide post*, p. 745.

Mere delay in enforcing a specialty debt for any period within 20 years affords no bar to its recovery. *In re Baker*, 20 Ch. D. 230, C. A.

A general replication never let in the subsequent promise, acknowledgment, or payment, as in actions for simple contract debts; for proof of a promise, not under seal, did not support the declaration; and if under seal, it was another and different cause of action. If there were a sufficient written acknowledgment within 3 & 4 W. 4, c. 42, s. 5, it must have been specially replied. *Kempe v. Gibbon*, 9 Q. B. 609. And this is still the rule. It must be shown which of the three sorts of acknowledgments,—viz., writing, payment, or satisfaction in part—is relied on. *Forsyth v. Bristowe*, 8 Exch. 347; 22 L. J., Ex. 70. The acknowledgment need not imply a promise, or be in itself a cause of action; *Moodie v. Bannister*, 4 Drew. 432; 28 L. J., Ch. 881; and an admission by the executors of the obligor in their answer to a suit *inter alios* is enough, S. C. Hence under sect. 5, the acknowledgment need not be to the creditor or his agent.

In an action of covenant for 400*l.* due on a mortgage deed, to which the plea of Stat. of Limitations was pleaded, plaintiff replied an acknowledgment within 20 years, and put in a deed of conveyance by defendant to trustees for payment of "all mortgages, debts, &c." in which it was recited that the land was "subject to a mortgage to W. H. (plaintiff) for 400*l.* and interest:" held insufficient, because it did not acknowledge an existing debt, but only an outstanding mortgage. *Howcutt v. Bonser*, 3 Exch. 491. In an action by mortgagee against mortgagor for principal and interest, after the lapse of 20 years, defendant pleaded the statute, to which plaintiff replied an acknowledgment in writing, and also part payment, within 20 years; within 20 years the defendant had assigned his equity of redemption by a deed reciting payment of interest "up to the date thereof:" held, that this was evidence of payment within 20 years: held also, that payment of interest by the assignee after assignment, was payment by the "agent" of the defendant. *Forsyth v. Bristowe*, 8 Exch. 716; 22 L. J., Ex. 255; see also *Dibb v. Walker*, *post*, p. 742.

On a plea that the "debt and cause of action" did not accrue *infra*, &c., pleaded to a bond, declared upon, without showing the condition, and issue thereon, it appeared at the trial to be a *post obit* bond, and that the *cestui que vie* died within 20 years: held, that the plaintiff was entitled to recover, for the real cause of action arises on the condition. *Tuckey v. Hawkins*, 4 C. B. 655. To a declaration on a bond, without stating the condition, which was for payment of an annuity, the defendant pleaded that the causes of action did not accrue within 20 years; on which plaintiff joined issue, and suggested breaches of non-payment of arrears within 20 years. On the trial, it appeared that there had been *also* breaches of condition 20 years ago, by payments of the annuities at irregular times, all of which, however, had been accepted by the plaintiff: held, that a new cause of action arose on each breach of the condition; that the previous breaches had been waived by acceptance, and that the plaintiff was entitled to a verdict on the issue. *Amott v. Holden*, 18 Q. B. 593; 22 L. J., Q. B. 14. A bond conditioned to replace stock is not within sect. 5 of the Act, which relates only to conditions for payment of money; therefore ac-

acknowledgment that it was not replaced, and a payment within 20 years of money conditioned to be paid in lieu of dividends, if the stock should not be replaced, will not rebut the statute so far as relates to the breach or condition to replace. *Blair v. Ormond*, 17 Q. B. 423; 20 L. J., Q. B. 444. But the condition to pay periodically the money due in lieu of dividends, was held to continue in force, and that plaintiff was entitled to damages for a breach for *non-payment* within 20 years. S. C. The acknowledgment by a devisee in trust where his co-devisee dissents is ineffectual. *Astbury v. Astbury*, (1898) 2 Ch. 111.

M. died indebted on a bond, in which the heirs were bound, having devised his estates in strict settlement; payment of interest by the devisee in possession, who took a life estate, was held to prevent the devisee in tail, in remainder, from setting up the statute when he came into possession. *Roddam v. Morley*, 1 De G. & J. 7; 26 L. J., Ch. 438; *acc. In re Lacey*, (1907) 1 Ch. D. 330, C. A.: see further, *ante*, p. 686. So payment of interest by the tenant for life of an equity of redemption, under a settlement made by the owner of the equity of redemption, keeps alive the covenant of such owner. *Dibb v. Walker*, (1893) 2 Ch. 429.

As to the application of the Statute of Limitations to actions by and against executors, *vide post*, pp. 1151, 1165.

The following are some of the most material statutes relating to actions on leases or other conveyances of real property, and the issues arising therein.

Where defendant is sued as assignee of the reversion.] The stat. 32 H. 8, c. 34, s. 2, first gave a right of action by the lessee against the assignee of the lessor on the covenants in the lease, the burthen of which ran with the reversion. As to what covenants so run, *vide post*, pp. 1025, 1026. This statute applied only to leases by deed, *vide ante*, p. 349. By the Conveyancing and Law of Property Act, 1881 (44 & 45 V. c. 41), s. 11 (1), "The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall," [if made after Dec. 31st, 1881, see sect. 11 (2)], "if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled."

This section "in no way alters the old law as to the class of covenants the burden of which will run with the reversion." *Davis v. Town Properties Investment Cor.*, (1903) 1 Ch. 797, 805, *per* Cozens Hardy, L. J.

Where plaintiff sues as assignee of reversion.] The stat. 32, H. 8, c. 34, s. 1, first enabled the assignee of the reversion to sue the lessee on the covenants in the lease, the benefit of which ran with the land. As to what covenants so run, *vide post*, pp. 1025, 1026. This statute applies only to leases by deed. By the Conveyancing and Law of Property Act, 1881, s. 10 (1), "Rent reserved by a lease" [made after Dec. 31st, 1881, see sect. 10 (2)] "and the benefit of every covenant or provision therein contained having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with

the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased."

This section seems to enable the person entitled to the income of the land to sue on covenants running with the land, *vide ante*, p. 724, although he may not have the legal reversion by interest or estoppel, and even though the lease is by parol only, unless a deed is required by law.

Where the lessor at the time of granting a lease has no title, but afterwards acquires one, the lease and reversion take effect in interest, and an action will lie by the assignee of the reversion on the covenants in the lease. *Webb v. Austin*, 7 M. & Gr. 701, and 728, n.; *Sturgeon v. Wingfield*, 15 M. & W. 224. And in *Cuthbertson v. Irving* (4 H. & N. 742; 28 L. J., Ex. 306), it was decided that a mortgagor of premises, having leased them to the defendant by an instrument which did not, and afterwards assigned the reversion by an instrument which *did*, declare his title, the defendant was estopped from objecting to the equitable title of the assignee. In this last case the interest of the plaintiff was purely one by estoppel. The lessee is not estopped from showing that the lessor had not a fee simple in the land demised, provided he does not assert that he had no estate in the land which would give effect to the deed. *Weld v. Baxter*, 11 Exch. 816; 25 L. J., Ex. 214; 1 H. & N. 568; 26 L. J., Ex. 112. If the lessor's want of title appear on the lease, both parties are estopped from asserting a legal reversion, and the covenants are in gross and not assignable. *Pargeter v. Harris*, 7 Q. B. 708; and see *Saunders v. Merryweather*, 3 H. & C. 902; 35 L. J., Ex. 115; and further, *post*, pp. 1004, 1082. Where a lessee makes an underlease for more than his term, and reserves rent, this rent is assignable by way of estoppel, and the assignee can sue the underlessee for the rent without attornment. *Williams v. Hayward*, 1 E. & E. 1040; 28 L. J., Q. B. 374. The assignee of part of the reversion in all the land may sue; Co. Litt. 215a; 1 Wms. Saund. 241a (5) (c); so the assignee of the reversion of part of the land; *Twynnam v. Pickard*, 2 B. & A. 105; and so a reversioner who has assigned the reversion of a part only. *Swansea, Mayor, &c. of, v. Thomas*, 10 Q. B. D. 48, cited *post*, p. 729.

Defence of assignment over of reversion by plaintiff.] The lessor cannot bring an action of covenant on the lease after he has parted with his reversion, for any breach of a covenant running with the land, which has accrued subsequently to the grant of the reversion, but the action can be brought only by the assignee of the reversion; for the stat. 32 H. 8, c. 34, has transferred the privity of the contract, together with the estate in the land, to the assignee of the reversion. 1 Wms. Saund. 241f (6). That statute applied only to leases by deed, but the stat. 44 & 45 V. c. 41, s. 10 (1), *ante*, p. 724, extends to all leases, whether by deed or parol, made after Dec. 31st, 1881, unless a deed is required by law. The defendant may therefore plead that the breach accrued after the assignment by the lessor of his reversion, but only in respect of covenants which run with the land. *Stokes v. Russell*, 3 T. R. 678; affirmed 1 H. Bl. 562; *Pargeter v. Harris*, *ante*, p. 725, and see *Davis v. Town Properties Investment Cor.*, *ante*, p. 724.

Of a similar nature is the question, who is the proper person to sue on the death of the lessor, owner in fee, for breaches of covenant which have accrued in his lifetime? It is laid down that where there are covenants real, that is which run with the land and descend to the heir, though there

may have been a formal breach in the ancestor's lifetime, yet if the substantial injury has taken place since his death, the heir, and not the executor, is the proper plaintiff. But the executor may sue for a breach of covenant during the testator's lifetime grounded on the special damage thereby caused to the testator's personal estate; 2 Wms. Saund. 181 *c* (h); *Kingdon v. Nottle*, 1 M. & S. 355; *Id. v. Id.*, 4 M. & S. 53; *King v. Jones*, 5 Taunt. 418; 4 M. & S. 188, Ex. Ch.; *Raymond v. Fitch*, 2 C. M. & R. 588, 598; or even although there be no such special damage. *Ricketts v. Weaver*, 12 M. & W. 718. But, where the covenant does not run with the land, the executor alone can sue. *Raymond v. Fitch*, *supra*.

The rights of a mortgagor to sue are now governed by the J. Act, 1873, s. 25 (5), *ante*, p. 307.

Defence of assignment over of term or of reversion by defendant.] In an action against the assignee of a term on a covenant in the lease, he may plead that he assigned over the term before breach, for the assignee is only liable for those breaches which have occurred while he is assignee; *Taylor v. Shum*, 1 B. & P. 21; *Paul v. Nurse*, 8 B. & C. 486; but for those breaches he may be sued even after he has parted with the term. *Harley v. King*, 2 C. M. & R. 18. The assignee is not liable for breaches committed before the assignment to him. *S. Saviour's v. Smith*, 3 Burr. 1271; and see *Coward v. Gregory*, L. R., 2 C. P. 153. If the defence be traversed, the defendant must prove the assignment, that is, that the whole term has been legally transferred by him to another. The 8 & 9 V. c. 106, s. 3, requires that an assignment should be proved by an instrument under seal. But as an underlease by the defendant for the whole of his term amounts to an assignment (*Parmenter v. Webber*, 8 Taunt. 593; *Beardman v. Wilson*, L. R., 4 C. P. 57; *Lewis v. Baker*, (1905) 1 Ch. 46), and the above section allows leases not exceeding three years to be by parol, it follows that a good assignment of such a lease may be made by way of underlease, without deed or writing. Where the defendant proved that, although he had executed the assignment, it had not been delivered to his assignee, having remained in the hands of the defendant's solicitor, who had prepared it for, and by order of, the assignee, and who had a lien upon it, it was held to be sufficient. *Odell v. Wake*, 3 Camp. 394. It would be otherwise if delivered as an escrow, or rejected by the assignee. The defendant need not prove notice to the plaintiff of the assignment; *Putcher v. Tovey*, 1 Salk. 81; 4 Mod. 71; nor the assent of the assignee to the assignment, for assent is presumed. *Leach v. Thompson*, 1 Show. 296; Freem. 2nd ed. 503 (b); see *Siggers v. Evans*, 5 E. & B. 367; 34 L. J., Q. B. 305; and *Hobson v. Thelluson*, L. R. 2 Q. B. 642. But his express refusal may, of course, be shown, and perhaps his incapacity to accept. As to infancy, see *Valentini v. Canali*, *ante*, p. 675. A reply that the assignment was fraudulent will not be supported by proof that the assignment was to a beggar in order to get rid of liability. *Ickenæ v. Nash*, Str. 1221; *Taylor v. Shum*, *ante*, p. 726; *Onslow v. Corrie*, 2 Madd. 330. But if there were real fraud, as a secret trust for the benefit of the assignor it would probably defeat the defence, if such fraud were replied. See S. C.; *Hyam's case*, 1 D. F. & J. 75; 29 L. J., Ch. 243; *Ex pte. Bunn*, 2 D. F. & J. 297; 31 L. J., Ch. 4; and *Ex pte. Bugg*, 2 Dr. & Sm. 452; 35 L. J., Ch. 43.

An assignee who takes the demised premises from the lessee by indenture indorsed on the lease "subject to the payment of the rent and the performance of the covenants and agreements reserved and contained in the lease," is not liable in covenant to the lessee for rent which the lessee has been called on by the lessor to pay after the assignee has assigned over. *Wolveridge v. Steward*, 1 Cr. & M. 644, Ex. Ch.

A lessor who has assigned his reversion, remains liable on his express covenants running therewith. *Stuart v. Joy*, (1904) 1 K. B. 362, C. A.

Defence traversing assignment to plaintiff.] Where the plaintiff sues as assignee of the reversion, and the defendant traverses the title as stated, it will be incumbent upon the plaintiff to prove it, by showing the mesne conveyances from the original lessor. See *Curvick v. Blugrave*, 1 B. & B. 531.

Where a lease made by *cestui que trust* under a power in a settlement, with covenants for rent, &c., with the lessor and "his assigns," recited the equitable estate of the lessor, it was held that "assigns," meant assigns of the settlor, and that the assignee of the legal reversion, though not assignee of the lessor, was entitled to take advantage of the covenants and condition of re-entry; *Greenaway v. Hart*, 14 C. B. 340; 23 L. J., C. P. 115; and that the lessee was not estopped from disputing the lessor's title to sue. S. C. The question who are assignees of the reversion, so as to be entitled to sue by virtue of the 32 H. 8, c. 34, is usually decided upon the pleading.

The assignee of the reversion cannot sue for breaches of covenant which accrued before the assignment to him. *Martyn v. Williams*, 1 H. & N. 817; 26 L. J., Ex. 117. And although 1 V. c. 26, s. 3, enacts that a right of entry for condition broken shall pass by will, yet this does not extend to an action on a covenant broken in the testator's lifetime.

Defence of surrender.] A surrender of a lease, such as could not be created without writing, must be by deed, 8 & 9 V. c. 106, s. 3, unless the surrender be by act and operation of law. The mere destruction of the sealed lease by consent of both parties was, at law, no surrender of the lease by operation of law; and debt lies for rent notwithstanding, for the estate is not divested. *Ward, Ltd. v. Lumley*, 5 H. & N. 87; 29 L. J., Ex. 322. A surrender by the assignee of the lease of part of the premises does not affect the liability of the lessee for, at any rate, the apportioned part of rent for the remainder of the premises. *Baynton v. Morgan*, 22 Q. B. D. 74, C. A.

As to what amounts to a surrender by act and operation of law, see *ante*, pp. 337 *et seq.*, and *Furnivall v. Grove*, 8 C. B., N. S. 456; 30 L. J., C. P. 3.

Defence of eviction.] An action of covenant for non-payment of rent can be defeated by proof of an eviction of the defendant from the premises in question, either by the lessor or one whose title is better than his. *Vide ante*, p. 341, where the cases as to what amounts to an eviction and the effect thereof are collected.

Where there has been an eviction, by title paramount, from part of the land demised, the lessor may sue the assignee of the lease in covenant for the apportioned part of the rent. *Stevenson v. Lambard*, 2 East, 575. The action in such case is brought on the privity of estate. So in an action of covenant brought by the lessor against his lessee, where the action is founded on the privity of contract; see *Swansea, Mayor of v. Thomas*, *post*, p. 729, dissenting from dictum, *contra*, in *Stevenson v. Lambard*, *supra*. An eviction from part of the subject-matter of the lease, was held to be no defence to an action for breaches of covenants to repair, and not to assign or underlet, it not appearing that the defendant had given up possession of the whole. *Hodgskin v. Queenborough*, Willes, 131, n. (b); *Newton v. Allin*, 1 Q. B. 518. And it would seem that the tenant, in such a case, cannot discharge himself from his liability to such covenants, by surrendering the residue of the premises,

from which he has not been ousted, to the landlord, if the latter refuse to accept possession of them. *Morrison v. Chadwick*, 7 C. B. 266.

Defence of bankruptcy of the plaintiff.] In an action of covenant for rent the defendant pleaded that the plaintiff became bankrupt after the rent was due. The plaintiff replied that he let the premises in question as trustee for a third person, and had no beneficial interest in the rent. It was held sufficient, under this replication, to show that the plaintiff had from time to time been in the habit of paying over the rent to the person who was stated to have the beneficial interest in the premises, and that there was no need of proving an express declaration of trust under the Statute of Frauds. *Houghton v. Kenig*, 18 C. B. 235; 25 L. J., C. P. 218.

Where defendant is sued as assignee of the lease.] Where an issue is taken upon the assignment it will be necessary to prove either a transfer of the interest by deed, or facts from which an assignment may by law be inferred. Where the statement of claim states generally that the term has vested in the defendant by assignment, it will be sufficient *prima facie* evidence to show that the defendant has paid rent as assignee, or is in possession of the premises. 2 Phillpotts, Ev., 7th ed. 151; Peake, Ev., 5th ed. 284. Thus, where A. had been tenant of certain premises, and upon his leaving them, B. had taken possession, it was held that he might be presumed to come in as assignee of A., though he had never paid rent. *Doe d. Morris v. Williams*, 6 B. & C. 41. The jury may, however, decline, to act upon such evidence, and find that there was no assignment in writing. *Paull v. Simpson*, 9 Q. B. 365. When the defendant has never entered or done anything to admit the assignment, his title may be proved by producing memorials of the mesne conveyances registered by parties under whom the defendant claims, after notice to the defendant to produce the originals. *Wollaston v. Hukewill*, 3 M. & Gr. 297. In this case it was decided that an executor who had not entered was liable as assignee, unless he discharged himself by pleading that he was no otherwise assignee than as executor, and that he had never entered into possession. Proof that the defendant is *executor de son tort*, appears sufficient to impose upon him the liability of assignee. *Paull v. Simpson*, *supra*. But one who has occupied premises under an *executor de son tort*, without any legal assignment of the lease, would seem to be free from such liability, except perhaps where the substitution in the tenancy could be proved to be fraudulent. S. C. Where a person has entered into possession of, or received the rents and profits of, premises demised to an intestate, and paid the rent reserved thereon, he is estopped from denying that he is assignee of the term, even though he is not chargeable as *executor de son tort*. *Williams v. Heales*, L. R., 9 C. P. 177. Where a term has been assigned by way of mortgage it is not necessary, in an action on a covenant charging the mortgagee as assignee, to prove that he has entered upon the mortgaged premises. *Williams v. Bosanquet*, 1 B. & B. 238. A trustee to whom a debtor's estate, including a lease, has been assigned for the benefit of creditors is liable as assignee if he do not repudiate the lease. See *White v. Hunt*, L. R., 6 Ex. 32, where the tenancy was from year to year.

Action against assignee of lease.—Defence.] In answer to this action the defendant may prove that he is not an assignee of the whole term, but only an undertenant. *Holford v. Hatch*, 1 Doug. 183; *Derby, El. of, v. Taylor*, 1 East, 502, and see *Bryant v. Hancock*, (1898) 1 Q. B. 716, C. A.; affirm. on other grounds (1899) A. C. 442, D. P. If he be charged as assignee of all the estate in certain premises and he is in fact an assignee of an undivided

part of the premises only, he cannot plead this in bar to the action; *Merceron v. Dowson*, 5 B. & C. 479; as it amounted to a plea in abatement only. *Grattan v. Wall*, 1 R., 2 C. L. 481. By Rules, 1883, O. xxi. r. 20, "no defence shall be pleaded in abatement." As to the manner in which an objection, formerly pleaded in abatement, is now to be taken, *vide ante*, p. 91. The defendant is not chargeable as assignee of the land for the entire rent, if the assignment be of part only. *Curtis v. Spilly*, 1 N. C. 756. The defendant may show that he is only devisee of the equity of redemption, the legal estate being in the mortgagee; *Carlisle, Mayor of, v. Blamire*, 8 East, 487; or that he is equitable assignee only, having taken possession under an agreement to take an assignment; *Cox v. Bishop*, 8 D. M. & G. 815; 26 L. J. Ch. 389; or only appointee, and not liable as such on a covenant binding the assigns of the appointor. *Rouch v. Wadham*, 6 East, 289; or that he only acquired a title against the lessee under stat. 3 & 4 W. 4, c. 27, s. 34, *post*, p. 1069, although he paid the lessor the rent reserved by the lease until he gave up possession at its expiration. *Titchborne v. Weir*, 67 L. T. 735, T. S. 1892, C. A. See further, *post*, p. 1070.

Formerly many questions arose as to the effect of a lessee's bankruptcy on the covenants entered into by him in his lease; and much difficulty arose under the earlier Bankrupt Acts as to whether the assignee had or had not accepted the lease so as to be liable on the covenants thereof. These questions do not, however, arise under the Bankruptcy Acts, 1883, 1890, which are now in force.

As to what covenants run with the land, so as to bind the assignees, see *Spencer's case*, 1 Smith's L. Cas. and notes.

Action by lessee against assignee.] The usual covenant by the assignee of a lease with the lessee L. is one of indemnity only, and L. cannot by injunction enforce the negative covenants therein, by means of the covenant to perform and observe those covenants, and to indemnify L. from all claim in respect of the same. *Harris v. Boots, &c.*, (1904) 2 Ch. 376. As to this indemnity *vide ante*, p. 593.

Action for rent under indenture of demise.] The action may be in the form of debt for the rent reserved by the lease, or of covenant on the covenant to pay. In the former case, the cause of action does not in strictness fall in this place; but, for convenience, debt and covenant for rent are here treated of together. See also *Action for use and occupation*, *ante*, pp. 333 *et seq.*, under which title some of the proofs applicable to issues, which occur in this action, will be found.

An action lies by the lessor, or the grantee of his reversion against the lessee, on his express covenant to pay rent, notwithstanding he have assigned the lease, and the lessor or his grantee have accepted the assignee as his tenant. 1 Wms. Saund. 240; 2 *Id.* 302 (5). But the lessor cannot, after he has parted with his reversion, bring an action of covenant for rent which accrued due after the grant of the reversion; the action can only be brought by the grantee of the reversion; for the stat. 32 H. 8, c. 34, has transferred the privity of contract together with the estate in the land to him. 1 Wms. Saund. 241 *f* (6). But where the lessor has assigned his reversion, in a part only of the land, the lessee is liable to him on the covenant, for an apportioned rent, in respect of the residue of the land, although the lessee had assigned all his interest in the whole of the land. *Swansea, Mayor, &c. of v. Thomas*, 10 Q. B. D. 48. And now see the Conveyancing and Law of Property Act, 1881 (44 & 45 V. c. 41), s. 10 (1) *ante*, p. 724. The lessor may bring an action of debt against the assignee of the lessee by reason of the privity of estate; but debt will not lie against the original lessee, after the

acceptance of the assignee by the lessor as his tenant, for this extinguishes the privity of contract which was created between them by the lease. 1 Wms. Saund. 241 b, (5); 2 *Id.* 302 (5); *Wadham v. Marlowe*, 8 East, 314, n.; 1 H. Bl. 437.

In an action of debt for rent, the statement of claim states a demise at a certain rent, the entry or holding of the defendant, and the accruing of rent during a certain period. Sometimes the lease by indenture is set out, but it is not then the gist of the action; but it is of course a material part of the claim where the action is in covenant.

Under the J. Act, 1873, s. 25 (5) (*ante*, p. 307), a mortgagor may sue for the rent of land mortgaged, which he is allowed by the mortgagee to enjoy.

Action for rent.—Evidence on denial of the demise, &c.] When the lease is in the pleadings stated to be under seal, and the contract is denied, it may be disproved under a defence denying the demise, or the execution of the deed.

Where the demise is denied, it may be proved by production and proof of a lease, executed by the plaintiff and accepted by the defendant, or by proof of the execution of it by the defendant, just as if the plaintiff had sued on the deed, and the defendant had denied execution. See 1 Wms. Saund. 276 (11); and *sub tit. Action for recovery of land by landlord*, *post*, p. 1009, and *Action of replevin.—Tenancy of the plaintiff*, *post*, p. 1082. Where it was alleged that the plaintiff had demised to the defendant three rooms, and it appeared in evidence that the demise was of three rooms *and the use of the furniture*, it was held to be rightly stated according to the legal effect; for the rent could not issue out of the chattels. *Walsh v. Pemberton*, 1 Selw. N. P., 2nd ed. 640; *Farewell v. Dickenson*, 6 B. & C. 251. But if the demise be of a messuage and tithes, or of a messuage and of a licence to sport, reserving an entire rent, and is not under seal, an action cannot be maintained for the rent reserved if the defendant have entered only; for the incorporeal right cannot pass except by deed; *Gardiner v. Williamson*, 2 B. & Ad. 336; *Bird v. Higginson*, 6 Ad. & E. 824; but if the tenant have enjoyed the right for the term, he must then pay the rent agreed on. See *Thomas v. Fredricks*, 10 Q. B. 775; *Adams v. Clutterbuck*, 10 Q. B. D. 403. The action lies although the plaintiff has re-entered for the non-payment of the rent sued for. *Hartshorne v. Watson*, 4 N. C. 178.

Action for rent.—Defence.—Payment.] As to proof of payment, *vide ante*, pp. 343, and 693 *et seq.* The defendant may show payment to the plaintiff, or to another by his appointment; *Taylor v. Beal*, Cro. Eliz. 222; Gilb. Ev. 6th ed., 153; or, that the plaintiff has agreed that a debt due by him to the defendant shall go in satisfaction of the rent; Gilb. on Debt, 443; but not that the plaintiff was bound by covenant to repair the premises, and that he (the defendant) expended the rent in necessary reparations; for this is only a cause of cross action; *Taylor v. Beal*, Cro. Eliz. 222; B. N. P. 177; and would therefore now be matter for counter-claim. But if the lessor direct the lessee to repair, and the lessee repair accordingly, the money so laid out may be evidence of payment. Gilb. on Debt, 442.

A compulsory payment of a charge upon the land may be recouped by the defendant out of his rent. *Dyer v. Bowley*, 2 Bing. 94, and cases cited *sub. tit. Action of replevin.—Denial of rent being in arrear*, *post*, p. 1086, where some statutes authorising deductions by the tenant from his rent are collected. But the defence in these cases would require to be pleaded specially.

As to deductions from rent for property tax paid, *vide Action for use and occupation—Payment*, *ante*, p. 343.

Action for rent.—Defence.—Readiness to pay on the land.] It is a good defence in an action of debt for rent, that the defendant was on the premises demised, ready to pay the rent at the time it became due, but the plaintiff was not there to receive it. *Crouch v. Fastolfe*, T. Raym. 418; see also *Tinckler v. Prentice*, 4 Taunt. 549. It was held bad in an action against the lessee on an express covenant to pay the rent. *Haldane v. Johnson*, 8 Exch. 689; 22 L. J., Ex. 264. But the defence would seem to be good in an action against an assignee of the lease, on a covenant to pay the rent, for such action is founded solely on privity of estate, and would therefore fall within the principle of *Crouch v. Fastolfe*, *supra*; see *per Cur.* 8 Exch. 694, 695; 22 L. J., Ex. 265.

Action for rent.—Defence.—Statute of Limitations.] It has been decided that, where the demise is by indenture, the action for rent is now limited, by 3 & 4 W. 4, c. 42, s. 3, to 20 years, and not, by 3 & 4 W. 4, c. 27, s. 42, to 6 years only. See these statutes and the cases decided thereon, *ante*, pp. 719 *et seq.*

Action for rent.—Defence.—Fraud.] It seems that fraud will not avoid a contract whereby an estate in land has passed to the defendant. *Feret v. Hill*, 15 C. B. 207; 23 L. J., C. P. 185. It is a good equitable defence that plaintiff had, to his knowledge, no title to part of the land he purported to demise. *Mostyn v. W. Mostyn Coal and Iron Co.*, 1 C. P. D. 145.

Breach of covenant not to assign, &c.] On a covenant "not to assign, transfer, set over, or otherwise do or put away the indenture of demise, or the premises hereby demised, or any part thereof," it has been held that an underlease is no evidence of a breach, but that an assignment of the whole term must be proved. *Crusoe d. Blencowe v. Bugby*, 2 W. Bl. 766; 3 Wils. 234; see *Grove v. Portal*, (1902) 1 Ch. 727; 1 Smith's L. C. 11th ed. 46 *et seq.* But where the proviso was "not to set, let, or assign over the demised premises, or any part thereof," an underlease was considered to be within the terms of the proviso; *Roe d. Gregson v. Harrison*, 2 T. R. 425; and, where a lease contained a proviso for re-entry in case the lessee "should demise, lease, grant, or let the premises, or any part thereof, or convey, alien, assign, or set over the indenture, or his estate therein, or any part thereof, for all or any part of the term;" it was held, that proof that the lessee had entered into partnership with A., and agreed that he should have the use of a back-room and other parts of the premises exclusively, was evidence of a forfeiture. *Roe d. Dingley v. Sales*, 1 M. & S. 297. Such a covenant is broken by a subdemise by way of mortgage. *Serjeant v. Nash Field & Co.*, (1903) 2 K. B. 304, C. A. But not by a mere licence to use parts only of the demised premises. *Edwardes v. Barrington*, 85 L. T. 650, Dec. 13th, 1901, D. P. An assignment by an assignee of a lease to his co-assignee is a breach of a covenant not to assign. *Varley v. Coppard*, L. R., 7 C. P. 505. But see hereon *Bristol, Cor. of v. Westcott*, 12 Ch. D. 461, 465, *per* Jessel, M.R. Where a lease is granted to partners, B. & H., it is no breach of a covenant, not "to part with the possession" of the premises, for H. to give up possession thereof to B. S. C., C. A. Taking a lodger is not a breach of a covenant not to underlet the house; *Doe d. Pitt v. Laming*, 4 Camp. 77: unless there be a distinct agreement for exclusive occupation of particular rooms. *Greenslade v. Tupscott*, 1 C. M. & R. 59, *per* Parke, B. See further as to the nature of a lodger's occupation, *sub-tit. Action for illegal distress*, *post*, p. 905.

On a covenant "not to let, assign, transfer, or otherwise part with the premises demised, or the lease," depositing the lease as a security is no

breach. *Doe d. Pitt v. Hogg*, 4 D. & Ry. 226; *Doe d. Pitt v. Laming*, Ry. & M. 36. See also *Gentle v. Faulkner*, (1900) 2 Q. B. 267, C. A. A lease contained a stipulation that for every acre, and so in proportion for a less quantity, of the land which the lessee should "suffer to be occupied" by any other person without the consent of the landlord, an additional rent should be paid; and the tenant undertook to "use, occupy," dress, and manure the land according to the custom of the country. The tenant, without the consent of the landlord, suffered other persons to use small portions of the land for the purpose of raising a potato crop, and it was proved to be the custom of the country for farmers to pursue that course; it was held that the landlord was entitled to the additional rent, this being an occupation of the land by other persons. *Greenslade v. Tapscott*, ante, p. 731. The lessee of a theatre, under a covenant not to grant, assign, or dispose of stalls or boxes "for a longer period than one year or season," let a box for a year, and then let it to another person in reversion for one year, commencing on a day certain in the following year or "such subsequent day during the year on which the theatre may be opened"; this was held to be no breach. *Croft v. Lumley*, 6 H. L. C. 672; 27 L. J., Q. B. 321.

A compulsory assignment by law is not a breach of a covenant not to assign. Thus the sale of a lease under a *bonâ fide* execution against the lessee is not a forfeiture of a condition not to assign. *Doe d. Mitchenson v. Carter*, 8 T. R. 57. But if the tenant give a warrant of attorney to his creditor, for the express purpose of enabling him to take the lease in execution, it will be a fraud, and a breach of the condition. S. C. *Id.* 300. Bankruptcy of the lessee on his own petition is no breach of a covenant not to assign. *Ex pte. Lovell*, (1901) 2 K. B. 16. But an assignment of the whole of the debtor's personal property, registered under the Bankruptcy Act, 1861, s. 192, was a breach of the covenant. *Holland v. Cole*, 1 H. & C. 67; 31 L. J., Ex. 481; and see *Doe d. Cheere v. Smith*, 5 Taunt. 795. An assignment, operating as an act of bankruptcy, and therefore void, will not be a breach of the covenant. *Doe d. Lloyd v. Powell*, 5 B. & C. 308. Where the covenant binds the lessee "and his assigns" not to assign over without licence, the compulsory assignment by bankruptcy will not discharge the covenant in the hands of subsequent voluntary assignees. See *Winter v. Dumergue*, 14 W. R. 281, M. T. 1865, C. P.; S. C. in Ex. Ch., *Id.* 699, E. T. 1866. So, although the devolution on an executor is not a breach of the covenant, yet if executors are named therein, the executor cannot assign without licence. *Roe d. Gregson v. Harrison*, 2 T. R. 425. Whether a devise by will is a breach of a covenant not to assign seems to be an unsettled question. *Shep. Touch.* 144; *Fox v. Swann*, Styles, 482; *Crusoe d. Blencowe v. Bugby*, 3 Wils. 237; *Doe d. Goodbehere v. Bevan*, 3 M. & S. 361; *Doe d. Evans v. Evans*, 9 Ad. & E. 719.

A covenant not to assign, where the assigns are named, binds the assignee of the lessee, although the assignment was made without the required licence; *Williams v. Earle*, L. R., 3 Q. B. 739; but it is only the assignee of the whole term that is bound, and if the lessee parts with the possession of the premises to A. under a licence to assign to A., but the assignment is never perfected, A. commits no forfeiture by assigning and giving up possession to B. without licence. *West v. Dobb*, L. R., 4 Q. B. 634; Ex. Ch., L. R., 5 Q. B. 460.

A covenant not to assign without the consent of the lessor, "such consent not being arbitrarily withheld," does not amount to a covenant by the lessor, but qualifies the lessee's covenant, so that if the lessor arbitrarily withhold his consent, the lessee may assign without any breach of covenant. *Sear v. House Property and Investment Soc.*, 16 Ch. D. 387; *Treloar v. Bigge*, L. R., 9 Ex. 151. It seems that a refusal "upon advice," though without stating

the grounds, is not "arbitrary," and that to be such, it must be "unfair and unreasonable." *S. C. Id.* 155, *per* Kelly, C. B., and Pollock, B. Refusal to consent to an assignment to L. for the purpose of his carrying on a highly dangerous business on the premises is not unreasonable or capricious. *Lepla v. Rogers*, (1893) 1 Q. B. 31, 35, *per* Hawkins, J. But a refusal by the landlord in order that he may obtain possession of the premises is unreasonable. *Bates v. Donaldson*, (1896) 2 Q. B. 241, C. A. In the case of such a covenant the lessor must be requested for his consent prior to the assignment, or the assignment, even to a proper tenant, will be a breach. *Barrow v. Isaacs*, (1891) 1 Q. B. 417, C. A.; *Eastern Telegraph Co. v. Dent*, (1899) 1 Q. B. 835, C. A., doubting *Hyde v. Warden*, 3 Ex. D. 72, C. A., in which case it was held that where consent was not to be withheld from assignment "to any responsible and respectable person," an assignment to such a person is no breach. A corporation is not such a tenant. *Harrison v. Barrow-in-Furness, Corporation of*, 64 L. T. 834, H. S. 1891, Romer, J. Where the lease provides that the licence shall not be unreasonably withheld, and a licence to assign to H. is granted with an unreasonable condition, the lessee Y. may, by an action against the lessor, obtain under Rules 1883, O. xxv., r. 5, a declaration that the lessor A. is not entitled to impose the condition, and that Y. may assign to H. without any further consent from A. *Young v. Ashley Gardens Properties*, (1903) 2 Ch. 112, C. A. See further *In re Spark's lease*, (1905) 1 Ch. 456. Where a lease contains a condition against sub-letting, &c., without the lessor's consent, and a sub-lease is granted with such consent to B., B. is under no restriction as to parting with his possession of the land so demised to him. *Williamson v. Williamson*, L. R., 9 Ch. 729.

By the Conveyancing and Law of Property Act, 1892 (55 & 56 V. c. 13), s. 3, a covenant, condition or agreement against assignment, &c., without licence is, unless otherwise expressed in the lease, deemed to be subject to a proviso that no fine shall be payable for such licence, but the proviso shall not preclude the right to require payment of a reasonable sum in respect of legal or other expense incurred in relation to such licence.

To prove the breach of a covenant not to assign or underlet, *Ld. Alvanley* held it to be *prima facie* sufficient to show that a stranger was in possession of the premises, apparently as a tenant, and that on inquiry such stranger said he rented the house. *Doe d. Hindly v. Rickarby*, 5 Esp. 4. But on a covenant "not to assign, set over, or otherwise let," Lord Ellenborough held that evidence that a stranger was in possession of the premises, with his name on the door, and that he said he had taken the premises from another stranger, was not sufficient; for *non constat* that the party in possession was not a tortious intruder. *Doe v. Payne*, 1 Stark. 86. According to *Doe d. Morris v. Williams*, 6 B. & C. 41, *ante*, p. 728, mere possession would seem to be evidence of an assignment.

The measure of damages in an action for a breach of a covenant not to assign, &c., is such a sum of money as will put the plaintiff in the same position as if the covenant had not been broken, and the plaintiff had retained the liability of the defendant instead of an inferior liability. *Williams v. Earle*, *ante*, p. 732. Where the assignment was made by the defendant R. to L. for the purpose of his carrying on a highly dangerous business on the premises, which was carried on therein, and in consequence thereof the premises were burned down, R. was held liable for the damage occasioned by the fire. *Lepla v. Rogers*, *supra*.

As a right of re-entry is commonly annexed to this covenant, its effect is more likely to come into question in an action for the recovery of land than in an action of covenant.

Breach of covenant as to trade on premises.] A covenant not to use a
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building "as a public-house for the sale of beer, wine, malt liquors, or spirits"; *Pease v. Coats*, L. R., 2 Eq. 689; or "as a beerhouse, inn, or public-house for the sale of spirituous liquors"; *L. & N. W. Ry. Co. v. Garnett*, L. R., 9 Eq. 26; *Holt v. Collyer*, 16 Ch. D. 718; is not broken by the sale of beer by retail under a licence "not to be drunk on the premises," for "beerhouse" means a house for the sale of beer to be consumed on the premises. S. CC. Nor is a covenant entered into in 1854, that "the trade or calling of an hotel or tavern keeper, publican, or beershop, keeper, or seller by retail of wine, beer, spirits, or spirituous liquors," should not be carried on on the premises, broken by the sale of wine in bottle by a grocer in the ordinary course of his trade; for the covenant is directed against the trade of a gin palace, and not that of a wine merchant. *Jones v. Bone*, L. R., 9 Eq. 674. See also *Stuart v. Diplock*, *infra*. But where the covenant was not to use the building "as an inn, public-house, or tap-room, or for the sale of spirituous liquors or ale or beer," it was held that although the covenant did not prevent the sale of wine, it extended to the sale by a grocer of spirituous liquors in bottle. *Feilden v. Slater*, L. R., 7 Eq. 523. So a covenant not to use the premises "as a beershop or public-house," is broken by the sale, by a grocer, of beer not to be consumed on the premises, for "beershop" means any place where beer is sold. *S. Albans, Bp. of v. Battersby*, 3 Q. B. D. 359; *accord. L. & Suburban Land & Building Co. v. Field*, 16 Ch. D. 645, C. A. So a covenant not to erect a public-house, beerhouse, or house for the sale of beer, wine, or spirituous liquors, nor to carry on the trade of an innkeeper, victualler, or retailer of wine, spirits, or beer, is broken by the sale of such liquors at refreshment bars at a theatre. *Buckle v. Fredericks*, 44 Ch. D. 244, C. A. See also *Fitz v. Hes*, (1893) 1 Ch. 77. As to the construction of the restrictive covenant in a tied public-house, see *Clegg v. Hands*, 44 Ch. D. 503, C. A.; *Manchester Brewery Co. v. Coombs*, (1901) 2 Ch. 608.

In a lease, a covenant against carrying on the trade of a victualler or publican, or against the house being used as a public-house or an ale-house, applies to any person licensed to sell beer or cider under stat. 11 G. 4 & 1 W. 4, c. 64; see sect. 31; and a covenant against the trade of a vintner, or using the house as a public-house, applies to any person licensed to sell wine on the premises under stat. 23 & 24 V. c. 27. See sect. 44. A covenant that the plaintiff "should have the exclusive right of supplying all ale, &c., which might be consumed in any house, &c., which might be erected on the land (conveyed) and which should be opened or used as an inn, &c.," is equivalent to a negative covenant that no other person than the plaintiff shall supply ale, &c. *Cutt v. Tourle*, L. R., 4 Ch. 654. Such a covenant is conditional on the plaintiff being willing to supply the defendant with good marketable ale, &c., at reasonable prices. *Luker v. Dennis*, 7 Ch. D. 227; see also *Edwick v. Hawkes*, 18 Ch. D. 199. Where a covenant restrains the lessee, G., from carrying on the business of a "restaurant similar to that carried on by R.," G. must not carry on a restaurant which would be likely seriously to compete with R.'s business. *Drew v. Guy*, (1894) 3 Ch. 25, C. A. A covenant not to carry on the business of a ladies' outfitter is not broken by carrying on a part of that business, which is also part of another distinct business, *e.g.*, that of hosiers, even although it is a substantial part of the business of ladies' outfitter, and only a subordinate part of the other business. *Stuart v. Diplock*, 43 Ch. D. 343, C. A.

A covenant not to use or exercise "any public trade or business" in a house, and that it should "be used and occupied as a private dwelling-house only" is broken by opening a school thereon; *Wickenden v. Webster*, 6 E. & B. 387; 25 L. J., Q. B. 264; *German v. Chapman*, 7 Ch. D. 271; or

by taking, as boarders, scholars of a school kept elsewhere by the defendant. *Hobson v. Tulloch*, (1898) 1 Ch. 424. So a covenant not to carry on, or permit to be carried on, any trade or business of any description whatsoever, is broken by opening thereon a charitable institution, under a superintendent, in which working girls are lodged and boarded, even although gratuitously; *Rolls v. Miller*, 27 Ch. D. 71, C. A.; or a hospital where the patients make small payments. *Bramwell v. Lucy*, 10 Ch. D. 691.

A covenant not to do or suffer to be done anything on the premises which may be to the annoyance, nuisance, grievance or damage of the lessor, his heirs or assigns, or the inhabitants of the neighbouring houses, is broken by anything which reasonably troubles the mind and pleasure of an ordinary sensible inhabitant, although it may not amount to physical detriment to comfort, or amount to a common law nuisance; *Tod-Heatley v. Benham*, 40 Ch. D. 80, 98, C. A.: as by the establishment on the premises of a hospital for the treatment of diseases which may be infectious. S. C. And it is sufficient that annoyance is in fact caused to the inhabitants of the neighbouring houses. S. C. See observations in this case on *Harrison v. Good*, L. R., 11 Eq. 338, and see also *Wauton v. Coppard*, (1899) 1 Ch. 92.

Where a breach of covenant as to trade, &c., in a lease has continued for upwards of 20 years, and, with full knowledge of it by the lessor, rent has been received by him, a licence is to be presumed. *Gibson v. Doeg*, 2 H. & N. 615; *acc. Hepworth v. Pickles*, (1900) 1 Ch. 108. As to waiver by acquiescence in breaches of similar covenants by tenants of other plots on the same estate, see *Peck v. Matthews*, L. R., 3 Eq. 515; *German v. Chapman*, *ante*, p. 734.

As to the breach of a covenant in a lease of licensed premises, properly to carry on the trade thereon, and not to forfeit the licence, see *Bryant v. Hancock*, (1899) A. C. 442, D. P.; *Wilson v. Twanley*, (1904) 2 K. B. 99, C. A., and *Palethorpe v. Home Brewery Co.*, (1906) 2 K. B. 5, C. A.

Breach of covenants for good husbandry, &c.] The proof of any act which, according to the natural and ordinary meaning of their words, is forbidden by these covenants, will entitle the plaintiff to a verdict. If the breach allege that the defendant did not use the farm in a husbandlike manner, "but, on the contrary, committed waste," the plaintiff is bound to prove waste. *Harris v. Mantle*, 3 T. R. 307. See *ante*, pp. 345 *et seq.*, and *Edge v. Pemberton*, 12 M. & W. 187, cited *post*, p. 740. As to the conversion of a farm into a market garden by erecting forcing houses thereon, see *Meur v. Cobby*, (1892) 2 Ch. 253. Where the breach is for bad husbandry, and the particulars delivered rely on non-cultivation, the plaintiff cannot show mere bad cultivation. *Doe d. Winnall v. Broad*, 2 M. & Gr. 523. But in such cases as these, the judge would probably now amend the breach or the particulars. A judge, however, will not amend as of course, if the amendment will only entitle to nominal damages for a breach, which defendant probably would not have contested. *Times Insurance Co. v. Hawke*, 28 L. J., Ex. 317. A covenant to spend on the farm all manure collected on it, extends to manure made by the cattle of strangers not fed on the farm, but turned on by a temporary licence. *Hindle v. Pollitt*, 6 M. & W. 529. A covenant by the tenant in a farm lease, that he would not "during the last year of the said term thereby granted, sell or remove from the said farm and lands any of the hay, straw, and fodder which should arise and grow on the said farm," extends to all hay, &c., which had grown on the land at any time during the term. *Gale v. Bates*, 3 H. & C. 84; 33 L. J., Ex. 235.

We have seen, *ante*, pp. 26, 27, that husbandry covenants may be controlled or explained by proof of custom not expressly or impliedly excluded by the covenant. See also *ante*, p. 348. Such customs apply to leases

under seal as well as by parol. *Wigglesworth v. Dallison*, 1 Doug. 201; 1 Smith's L. C. But the course of pleading on covenants will sometimes require that the custom should be pleaded by the defendant, except where it is only used to explain the covenant. In a covenant to pay a penal rent for using land otherwise than for pasture or meadow, it is for the jury to say whether the use of it as a race-course was in fact incompatible with the covenant. *Semb. Aldridge v. Howard*, 4 M. & Gr. 921. A covenant that the tenant will when required perform each year for the landlord a certain amount of team-work, gives the landlord a right to team-work generally, and not merely for agricultural purposes. *Marlborough, Dk. of v. Osborne*, 5 B. & S. 67; 33 L. J., Q. B. 148.

A covenant not to sell or carry away from the demised premises any hay, straw, &c., grown or produced there, without the consent in writing of the plaintiff first had and obtained, under the increased rent of 10*l.* for every ton so given, sold, or carried away, was held to give the tenant a right to remove hay, straw, &c., upon paying the increased rent. *Legh v. Lillie*, 6 H. & N. 165; 30 L. J., Ex. 25. If a lease provide that the tenant shall not cut down nor lop trees under a penalty of 20*l.* for each tree cut or lopped, the lessor, upon breach, may proceed either for the penalty, or for unliquidated damages; in the latter case the jury are not bound to give the whole penalty. *Hurst v. Hurst*, 4 Exch. 571. Where there was a lease reserving yearly rent, payable on half-yearly days, and a further rent, payable on the same days, for every acre converted into tillage without licence, or planted with rape, woad, or potatoes, or from which successive crops should be taken, without summer fallows, &c., it was held that, after one breach of covenant, the increased rent attached and continued to the end of the term. *Bowers v. Nixon*, 12 Q. B. 558, n., affirm. in error. A covenant not to take more than 2 crops during 4 years, means any 4 years, and not each succeeding 4 years, reckoning from taking the lease. *Fleming v. Snook*, 5 Beav. 250.

Where the grantee, H., of the right of sporting over certain lands in the occupation of R. covenanted with the grantor, W., to keep down the rabbits "so that no appreciable damage may be done to the crops thereon," it was held that W., being under no liability to compensate R. for injury done to the crops, by breach of the covenant, could only recover nominal damages therefor from H. *West v. Houghton*, 4 C. P. D. 197.

The Agricultural Holdings Act, 1906, 6 E. 7, c. 56 (which by sect. 9, comes into operation on Jan. 1st, 1909), s. 2, relates to compensation to tenants for damage done by game. *Id.* s. 3, *ante*, p. 349, regulates cropping and disposal of produce by tenants.

Breach of covenant to insure.] The covenant to insure has always been construed strictly in courts of common law. As to the onus of proof in actions for not insuring, see cases cited *Onus Probandi*, *ante*, p. 95. The covenant, however, usually provides some mode of proof, as that the lessee shall produce his policy when required. In *Doe d. Darlington v. Ulph*, 13 Q. B. 204, where there was a covenant "to ensure at all times previously to the expiration of the term thereby granted," and the lessee did not effect an insurance till a month after the creation of the term, it was held, that, in the absence of evidence to explain this delay, the plaintiff was entitled to a verdict, and that the jury ought not to be asked whether the insurance was effected within a reasonable time. *Semb.*, if the lessee had insured the premises shortly after the execution of the lease, he would have complied with his covenant. S. C. *per* Pattison, J. In *Price v. Worwood*, 4 H. & N. 512; 28 L. J., Ex. 329, the omission to insure had been repeatedly confessed by the tenant, who excused himself by saying that he could not afford the insurance. As he appeared to be no richer at the time of issuing

the writ, it was held that there was some evidence to go to the jury of the breach.

If the covenant is to insure in the name of A., it is a breach to insure in the joint names of A. and the lessee. *Pennuall v. Harborne*, 11 Q. B. 368. But see *Havens v. Middleton*, 10 Hare, 641; 22 L. J., Ch. 746.

A covenant to keep buildings insured against fire runs with the land, for the stat. 14 G. 3, c. 78, s. 83, enables the landlord to have the insurance money laid out in reinstating the premises, so that the covenant, with the aid of the statute, amounts to a covenant to repair. *Vernon v. Smith*, 5 B. & A. 1. The operation of this section has been held to be general, and not to be confined to the metropolitan district. *Ex pte. Gorely*, 4 D. J. & S. 477; 34 L. J., Bky. 1.

Breach of covenant to repair, &c.] As to buildings then erected, a covenant to repair, or put in repair, or deliver up in repair, runs with land, and binds assignees though not named in it. *Martyn v. Clue*, 18 Q. B. 661; 22 L. J., Q. B. 147. The assignee of a lease is not liable, on a general covenant, to repair buildings erected during the term, unless assigns are named in it. *Spencer's case*, 5 Rep. 61; *Bally v. Wells*, 3 Wils. 25; *Doughty v. Bowman*, 11 Q. B. 444. *Contra*, *Minshull v. Oakes*, 2 H. & N. 793; 27 L. J., Ex. 194; but this case was decided on a misapprehension of *Spencer's case* (see notes thereto in 1 Smith's L. C., 11th ed. 70 *et seq.*), and has been much disapproved. In *Cornish v. Cleife*, 3 H. & C. 446; 34 L. J., Ex. 19, a covenant, in a demise of three houses and a field, "well and sufficiently to repair, sustain and keep the said tenements or dwelling-houses, field or plot of ground and premises, and every part thereof, as well in houses, buildings," &c., during the term, was held not to extend to houses erected during the term in the field. This case agrees with the ruling in *Doe d. Worcester School, &c. Trustees v. Rowlands*, 9 C. & P. 734; but is clearly inconsistent with the decision in *Brown v. Blunden*, Skin. 121; and the opinions of the judges expressed in *Darcy v. Ashwith*, Hob. 234; and *Douse v. Earle*, 3 Lev. 265; S. C., *sub. nom.* *Douse v. Call*, 2 Vent. 128, cited in Bac. Abr. Covenant (F).

A covenant to keep a house in repair is satisfied by keeping it in substantial repair according to the nature of the building; and with a view to determine the sufficiency of the repair, the jury may inquire whether the house was new or old at the time of the demise. *Stanley v. Towgood*, 3 N. C. 4; *accord.* *Mantz v. Goring*, 4 N. C. 451. So in the case of an old house such a covenant does not mean that the house should be delivered up in a renewed form or of greater value than it was at the beginning of the term, or that the consequences of the elements should be averted; but the tenant has the duty of keeping the house in the state in which it was at the time of the demise, by the timely expenditure of money and care; *Gutteridge v. Munyard*, 1 M. & Rob. 334; 7 C. & P. 129; *accord.* *Lister v. Lane*, *post*, p. 733. And it was held on an issue as to the amount of damages for not keeping in repair, the bad state of the premises when demised was legitimate evidence for the defendant. *Burdett v. Withers*, 7 Ad. & E. 136. See also *Walker v. Hatton*, 10 M. & W. 249; *Martyn v. Clue*, 18 Q. B. 661, 674. But in *Payne v. Haine*, 16 M. & W. 541, a tenant under such covenant was held bound to put in repair, though the nature of the repairs ought to be measured by the age and class of the demised premises. And in *Easton v. Pratt*, 2 H. & C. 683; 33 L. J., Ex. 233, Ex. Ch., it was held that a lease, whereby the lessee covenanted that he would "well and sufficiently repair, uphold, support, paint, maintain, amend and keep" the demised premises, and the said premises "so well and sufficiently repaired," &c., at the expiration of the term surrender, was a "repairing lease," on the ground that "whatever was the state of the premises at the time of the demise the

tenant would be bound under this covenant to put the premises into, and keep the premises in, a state of good and sufficient repair. *Payne v. Haine* (*supra*) is an authority on this point;" 33 L. J., Ex. 235; the report in 2 H. & C. 687 is to the same effect. *Accord. Sauer v. Bilton*, 7 Ch. D. 815; *Truscott v. Diamond Rock Boring Co.*, 20 Ch. D. 251, C. A. See also *Inglis v. Buttery*, 3 Ap. Ca. 552, D. P. It is sufficient if the covenant be substantially complied with. *Harris v. Jones*, 1 M. & Rob. 173. Under a covenant to "substantially repair, uphold and maintain" a house, the tenant has been held bound to keep up the painting of the inner doors, inside shutters, &c. *Monk v. Noyes*, 1 C. & P. 265, *cor.* Abbott, C.J. But the tenant under a covenant to repair is liable for repairs only, and not for the extra expense of laying a new floor on an improved plan, or the like. *Soward v. Leggatt*, 7 C. & P. 613. And where a house was built on a timber platform resting on boggy soil, and the timber rotted causing the wall of the house to bulge, so that it became dangerous and had to be pulled down, the defendant was held not liable to make good the defect by underpinning, which was the only way possible, as it arose from the effect of time and nature on such a house. *Lister v. Lane*, (1893) 2 Q. B. 212, C. A.; *accord. Wright v. Lawson*, (1903) W. N. 108, E. S., C. A.; and *Torrens v. Walker*, (1906) 2 Ch. 166. And a lessee under a covenant to put in repair, or to keep in repair, is not bound in either case to substitute new buildings for old. *Belcher v. McIntosh*, 2 M. & Rob. 186: 8 C. & P. 720. And the result of the above cases is that an agreement to keep a house "in good tenable repair, and so to leave the same at the expiration thereof," obliges the tenant to put and keep the premises in such "repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it." *Proudfoot v. Hart*, 25 Q. B. D. 42, C. A. This repair may involve re-papering and re-painting, but, *semble*, not re-gilding. S. C. "Good repair" is much the same thing as "tenantable repair." *Id.* p. 51, *per* Ld. Esher, M. R. See further *Crawford v. Newton*, 36 W. R. 54, T. S. 1886, C. A. Where the covenant is to keep and leave the house in as good a plight as it was in at the time of the making of the lease, it is said that ordinary and natural decay is no breach of the covenant, and that the covenantor is only bound to do his best to keep it in the same plight, and therefore to keep it covered, &c.; Fitz. Ab. Cov. 4; Shep. Touch. 169; *Johnson v. S. Peter, Hereford*, 4 Ad. & E. 520. And a lessee who covenants to deliver up the premises in good repair "fair wear and tear and damage by tempest excepted" is not liable for permissive waste. *Davies v. Davies*, 38 Ch. D. 499; see also *Scales v. Lawrence*, 2 F. & F. 289, *cor.* Willes, J. But where the lessee covenants to repair the inside of a warehouse, "damage by fire, storm and tempest or other inevitable accident, and reasonable wear and tear only excepted," the total destruction of the property caused by its user by the lessee, is not within the exception. *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D. 507. The lessee, under the covenants to repair, is not bound to reinstate the house, which was altered by him before the lease was executed, though since the date fixed by the habendum for the beginning of the term. *Shaw v. Kay*, 1 Exch. 412.

On a covenant to repair, it is not sufficient evidence of a breach to show that the house has been thrown down by a tempest, unless the covenantor has not repaired within a reasonable time after. Shep. Touch. 173. Where the defendant pleads that he was always ready to repair, but a reasonable time had not elapsed, and issue is taken thereon, proof that the defendant absolutely refused to repair entitles the plaintiff to a verdict. *Green v. Eales*, 2 Q. B. 225. Where the damage was alleged to be occasioned by the defendant's neglect to repair and "from no other cause," it was held

sufficient to show that the premises became insecure by the removal of an adjoining wall by a third party, and that the defendant did not set about the repair in time to prevent the mischief consequent on such removal. *S. C.* If the lessee were bound to repair and leave the house in the same plight as he found it, and it were burnt by sparks from the chimney of the lessor's house near, it was held that the lessee was excused from rebuilding, for this came by the act of the lessor himself. 1 Rol. Ab. 454, pl. 8.

Where the premises have passed through successive hands, it is sometimes not easy to prove in whose hands the want of repair occurred, and each assignee is liable to the lessor for his own default only. But where the plaintiff, a lessee under covenant to repair, assigned over to defendant, who assigned to B., who assigned to C., &c., and the plaintiff, being then obliged to pay damages for non-repair to the ground landlord, sued defendant for the amount, there being evidence of want of repair while in the hands of one of defendant's assignees: it was held, that the plaintiff was entitled to substantial, and not nominal, damages, without showing the exact amount of non-repair attributable to the defendant himself. *Smith v. Peat*, 9 Exch. 161; 23 L. J., Ex. 84. A lessee, under covenant to deliver up certain fixtures at the end of his term, on the 1st of April, remained in possession till the 10th, when possession was demanded by the lessor, and on the 13th he bought the title of a mortgagee of the lessor and refused to re-deliver: held that the lessor was entitled only to damage for the detention of the fixtures between the 10th and 13th, and not to the full value of them. *Watson v. Lane*, 11 Exch. 769; 25 L. J., Ex. 101. The breach of a covenant to put premises in repair is not a continuing breach. *Coward v. Gregory*, L. R., 2 C. P. 153. See, however, *Martyn v. Clue*, 18 Q. B. 661; 22 L. J., Q. B. 147.

Where the covenant is to keep in repair during the continuance of the term, an action for the breach of the covenant may be maintained before the term has expired. *Luxmore v. Robson*, 1 B. & A. 584. In the case of *Marriott v. Cotton*, 2 Car. & K. 533, Rolfe, B., directed the jury that nominal damages only could be recovered in such an action, for the lessor (as he said) might pocket the damages and leave the premises unrepaired, and so oblige the lessee to repair them for his own convenience; but the Ct. of Q. B. held the direction wrong, and a verdict was subsequently entered for substantial damages. See *Bell v. Hayden*, 9 Ir. C. L. R. 301, 303, *per* O'Brien, J.; *Smith v. Peat*, *ante*, p. 739. The proper measure of damages is the diminution to the value of the reversion at the time of action. *Doe d. Worcester School, &c. Trustees v. Rowlands*, 9 C. & P. 734; *Bell v. Hayden*, *supra*; *Mills v. E. London Union*, L. R., 8 C. P. 79; *Henderson v. Thorn*, (1893) 2 Q. B. 164, 166; *Williams v. Williams*, L. R., 9 C. P. 659. In this last case it was held that where the landlord had himself repaired the premises before action, he could not recover more than nominal damages; *sed quære*. Where, however, the above-mentioned measure of damages is inapplicable, such diminution of value is not the only test; thus, the lessor may sue, though his reversion has been forfeited by the entry of the ground landlord for the breach, and the test is what will be the cost of repair. *Davies v. Underwood*, 2 H. & N. 570; 27 L. J., Ex. 113. This is indeed the general rule laid down by Ld. Holt in *Virian v. Champion*, 2 Ld. Raym. 1125, and was approved by the court in *Davies v. Underwood*, *supra*, but was not followed in *Mills v. E. London Union*, *supra*; and no hard and fast rule can be laid down as to the damages recoverable during the currency of the term. "All the circumstances of the case must be taken into consideration and the damages must be assessed at such a sum as reasonably represents the damage which the covenantee has sustained by the breach of covenant," *per* Ld. Herschell in *Conquest v. Elbbetts*, (1896) A. C. 490, 494. Thus in a case of a breach of

covenant to repair in a sub-lease granted with notice to the sub-lessee of a similar covenant in the superior lease, the damages are the cost of repair, with a rebate for present payment, this being the difference of the value of the reversion repaired and unrepaired. S. C. affirming (1895) 2 Ch. 377, C. A.

Where the action is brought after the expiration of the lease, the damages recoverable are, in general, the cost of putting the premises into the state of repair contemplated by the covenant. *Morgan v. Hardy*, 17 Q. B. D. 770, not affected on this point by the judgment of the C. A., 18 Q. B. D. 646; or D. P., 13 Ap. Ca. 351; *Joyner v. Weeks*, (1891) 2 Q. B. 31, C. A. Such measure is not affected by reason of the lessor, J., having re-let the premises to a third person, L., from the end of the defendant's lease, on such terms that J. is, at the time of the action, in as good a position as if the defendant had kept his covenants; S. C.; nor by changes in the surrounding neighbourhood, owing to which less repairs might make the house equally valuable for letting. *Morgan v. Hardy*, *supra*. See also *Rawlings v. Morgan*, 18 C. B., N. S. 776; 34 L. J., C. P. 185; *Conquest v. Ebbetts*, *ante*, p. 739. Where an action was brought for non-repair of premises, demised by the plaintiff to the defendant, the defendant being bound to repair and insure, and the jury found that the premises, which had been burnt down, would cost 1,600*l.* to rebuild, and that this would exceed by 600*l.* the value of the old premises, if they had been repaired by the defendant before the fire, the court held that 1,000*l.* was the measure of damage. *Yates v. Dunster*, 11 Exch. 15; 24 L. J., Ex. 226. See also *In re Russell*, 29 Ch. D. 254, C. A. Damages for loss of rent during the time occupied by the plaintiff after the expiration of the term in doing the repairs are recoverable. *Woods v. Pope*, 6 C. & P. 782; 1 N. C. 467; *Proudfoot v. Hart*, 25 Q. B. D. 47, *per* Cave, J.; *Birch v. Clifford*, 8 T. L. R. 103, Nov. 28th, 1891, Wright, J. If a second action be brought on a covenant to keep premises in repair, the verdict recovered in the former action may be proved in mitigation of damages, but is not pleadable in bar. *Coward v. Gregory*, L. R., 2 C. P. 153. If the second action be at the end of the term and be brought for damages, some of which are included in the former action, the proper damages are the cost of repairs, less the amount previously recovered, and an allowance for depreciation from the repairs not having been duly executed. *Henderson v. Thorn*, (1893) 2 Q. B. 164. See further on the measure of damages on repairing covenant, *Minshull v. Oakes*, 2 H. & N. 793; 27 L. J., Ex. 194; and Mayne on Damages, 7th ed. pp. 287 *et seq.*

Breaking a doorway through the wall of the demised house amounts to a breach of a covenant to keep in repair. *Doe d. Vickery v. Jackson*, 2 Stark. 293. A lessee covenanted to repair, uphold, support, sustain, maintain, &c., all the houses and brick walls. Pulling down a brick wall dividing the courtyard in front from another yard at the side was held a breach of the covenant. *Doe d. Wetherall v. Bird*, 6 C. & P. 195. But a mere covenant to repair is not broken by alterations and improvements where they are evidently contemplated by the lease; as where a private dwelling-house is demised by lease containing a covenant to repair the premises and all such buildings, "improvements and additions," as should be made thereupon by the lessee. *Doe d. Dalton v. Jones*, 4 B. & Ad. 126; see also *Doherty v. Allman*, 3 Ap. Ca. 709, D. P. A covenant to deliver all "windows" then or thereafter affixed or belonging to the premises, extends to a plate-glass shop window put up by the lessee, so as to be moveable without screws, nails, or glue, and fastened only by wedges. *Burt v. Haslett*, 25 L. J., C. P. 201; Ex. Ch., 18 C. B. 893; 25 L. J., C. P. 295. On a covenant to repair, the breach alleged that defendant did not repair, "but on the contrary permitted the premises to be ruinous for want of repair." Held, that plaintiff must show permissive and not voluntary waste. *Edge v. Pemberton*, 12 M. & W. 187.

Where the lessee is obliged to repair in consequence of his lessor's refusal to do so, he cannot recover the expense of finding other premises for use during the repairs. *Green v. Eales*, 2 Q. B. 225. A lessee, who underlets with covenants to repair in the same terms as in his own lease, is not necessarily entitled to recover from the under-lessee the cost of an action for non-repair brought against himself; for though the covenants of the lessee and under-lessee may be in words the same, they are, in substance, different if entered into at different times. *Walker v. Hatton*, 10 M. & W. 249. This case was decided on the ground that a covenant to repair is to be construed with reference to the state of the premises when it began to operate; and this ground is no doubt a sound one if by "state of the premises" is meant their age, and not their state of repair, for the lessee's liability under a repairing lease is not dependent on the state of repair in which the premises were at the time of the demise. *Easton v. Pratt*, 2 H. & C. 683; 33 L. J., Ex. 233, Ex. Ch., cited *ante*, p. 737. But the lessee may recover the amount of dilapidations recovered against himself and occasioned by the under-lessee's neglect. *Penley v. Watts*, 7 M. & W. 601; *Walker v. Hatton*, *supra*. And he may recover the costs of such action, if he have given notice of it to the under-lessee, and received his sanction for defending it: and his sanction may be inferred if he do not prohibit the defence. *Semb. Blythe v. Smith*, 5 M. & Gr. 405, 412-3; and see *Rolph v. Crouch*, cited *post*, p. 748. And where the under-lessee, A., contracted with the lessee, B., to perform the covenants of the superior lease, A. is under a contract to indemnify B., and is, without such sanction, liable to B. for the costs of an action brought against B. by the superior landlord, and reasonably defended. *Hornby v. Cardwell*, 8 Q. B. D. 329, *per* Brett and Cotton, L. JJ. The lessee cannot recover from his under-lessee, as special damage, the value of a lease forfeited for non-repair, unless it appears that the forfeiture was solely owing to the under-lessee's non-repair. *Clow v. Brogden*, 2 M. & Gr. 39. Where A. demised to the plaintiff with special covenants to repair and insure, and the plaintiff underlet to the defendant with like covenants, and A. afterwards recovered possession for breach of the plaintiff's covenant, it was held that the plaintiff could not, in an action of covenant against the defendant, recover damages for the loss of his beneficial reversion in the term; for the term was forfeited for the breach, not of the defendant's covenants, but of the plaintiff's covenants, and there was no covenant by defendant to indemnify. *Logan v. Hull*, 4 C. B. 598.

Where the defendant covenanted to keep the demised premises in repair, the same being first put into repair by the landlord, it was held that the repairing by the landlord was a condition precedent to the defendant's obligation on his covenant. *Neale v. Ratcliffe*, 15 Q. B. 916; 20 L. J., Q. B. 130; *Coward v. Gregory*, L. R., 2 C. P. 153. A lessor cannot be sued on a covenant to keep demised premises in repair, unless he has had notice of the want of repair. *Makin v. Watkinson*, L. R., 6 Ex. 25; *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D. 507; *Torrens v. Walker*, (1906) 2 Ch. 166. Such a covenant must be construed with regard to the age and condition of the house in the same way as in the case of a similar covenant by the lessee, *vide ante*, pp. 737, 738. S. C. It implies a licence to the landlord to go on the land, for a reasonable time, to effect the repairs requisite. *Saner v. Bilton*, 7 Ch. D. 815. Where the covenant is to repair, the defendant being allowed rough timber by the lessor, the general averment by the plaintiff (lessor) of readiness to supply, &c., will not oblige him to show that he has cut down and prepared timber, defendant not having required him to do so. *Semb. Martyn v. Clue*, 18 Q. B. 661; 22 L. J., Q. B. 147. An agreement by the landlord to put a building in good tenantable repair is satisfied if it is in such repair when the tenant takes possession, and he does so without objection, although in fact the repairs prove insufficient to

strengthen the building sufficiently for the particular purpose to which the tenant applies it. *McClure v. Little*, 19 L. T. 287, M. T. 1868, Ex. See *Saner v. Bilton*, *ante*, p. 741.

A covenant by lessor to keep premises in proper condition for storing cartridges has reference only to the physical condition of the premises. *Newby v. Sharpe*, 8 Ch. D. 39, C. A.

As to a lessee's liability to costs and expenses incurred by the lessor in employing a solicitor, surveyor, &c., in reference to a breach giving a right of re-entry, which the lessor has waived, or from which the lessee is relieved, see the Conveyancing and Law of Property Act, 1892 (55 & 56 V. c. 13), s. 2 (1) cited *sub tit. Action for recovery of land by the landlord—Forfeiture waived, post*, p. 1035.

The lessee's liability for past non-repair is not affected by notice to quit given by him under a proviso in the lease that on such notice "the indenture and every clause, matter, and thing therein contained shall upon the expiration of the notice determine and be void." *Blore v. Giulini*, (1903) 1 K. B. 356.

As to the liability over of an assignee who has indemnified the defendant, and has been brought in as a third party, see *Gooch v. Clutterbuck*, (1899) 2 Q. B. 148, C. A.

In the case of a building let in flats, the owner is bound, on notice that the stairs, roof, &c., which he has not demised are out of repair, to take reasonable care to repair the same, or he will be liable for damage resulting to his tenant from such non-repair. *Hargroves, &c. v. Hartopp*, (1905) 1 K. B. 472, see further *post*, pp. 791, 792.

A covenant not to make alterations in premises let for the purpose of trade must be limited to such alterations as would affect the form and structure of the building, and not exclude things fixed to the premises for the purpose of carrying on the business in a reasonable way. See *Bickmore v. Dimmer*, (1903) 1 Ch. 158, C. A. Thus under such a covenant a jeweller was allowed to fix a large double clock face on the front of his premises by bolts let into their front wall. S. C.

As to specific performance of a covenant by a grantee or lessee to build on the land granted or demised, see *Wolverhampton Cor. v. Emmons*, (1901) 1 K. B. 515; *Molyneux v. Richard*, (1906) 1 Ch. 34.

Breach of covenant to pay rates and taxes.] This covenant seems to extend to subsequently imposed taxes of the same nature as those in existence at the time of the covenant, but not to taxes of a different nature; see *Brewster v. Kitchell*, 1 Salk. 198; 1 Ld. Raym. 317. In this case the covenant was to pay a rent-charge, without deducting any taxes. A covenant to pay the rent without "any deduction, defalcation, or abatement"; *Bradbury v. Wright*, 3 Doug. 624; or an agreement to pay all taxes; *Amfield v. White*, Ry. & M. 246; obliges the tenant to pay the land tax. See *Christ's Hospital v. Harrild*, 2 M. & Gr. 707, as to tenant's liability for rent-charge in lieu of land tax. A parliamentary tax is one imposed directly by Act of Parliament. *Palmer v. Earith*, 14 M. & W. 428, *per* Parke, B. A sewers rate did not fall within a covenant of this description. S. C. See also *Baker v. Greenhill*, 3 Q. B. 148. A covenant to pay all taxes and assessments, except "the level tax, property tax, and land tax," was held not to include the tithe rent-charge of which the lessor was owner. *Jeffrey v. Neale*, L. R., 6 C. P. 240. A covenant by the lessor in the lease of a warehouse, to pay all rates, taxes, and impositions whatsoever, whether parliamentary, parochial, or imposed by the Corporation of the City of London, or otherwise howsoever, which then were, or thereafter might be, rated, charged, or assessed on the said premises or any part thereof, or on the said yearly rent, or on the landlord, owner, or tenants of the said yearly rent, does not include water-rate due to

a water company. *Badcock v. Hunt*, 22 Q. B. D. 145, C. A. *Scrus*, in the case of the lease of a shop and basement, forming part of a block of buildings to the whole of which water for domestic purposes was being supplied by the Metropolitan Water Board, where the lessor covenanted "to procure to be paid all rates and taxes payable in respect of the demised premises." *Bourne v. Salmon, &c.*, (1907) 1 Ch. 616, C. A.

A covenant to pay rent "clear of all deductions" does not imply a contract under the Metropolitan Management Amendment Act, 1862 (25 & 26 V. c. 102), s. 96, by the tenant to pay assessments charged by that section on the owner. *Home & Colonial Stores v. Todd*, 63 L. T. 829, H. S. cor. North, J.

Covenants to pay taxes, &c., are frequently so framed as not to be limited in their application to the usual annual assessments made, but to extend to sums levied for the permanent improvement of the premises. How far they so extend depends on the construction of the covenant in each case. *Budd v. Marshall*, 5 C. P. D. 490, *per* Baggallay, L.J. Thus, the words "all outgoing whatsoever, rates, taxes, scots, &c., whether parochial or parliamentary, which then were or should be thereafter" chargeable on the said marsh lands demised, were held to include an extraordinary assessment made by commissioners of sewers for a work of permanent benefit on the land. *Waller v. Andreus*, 3 M. & W. 312. So a covenant to pay rent, "free and clear of and from all manner of parliamentary, parochial, and other taxes, rates and assessments, deductions, or abatements whatsoever," was held to include the expense of paving footways adjoining the houses, which paving was done under a local act requiring the expense to be paid primarily by the tenants, and empowering them to deduct from their landlord's rent the sum so paid by them. *Payne v. Burridge*, 12 M. & W. 727. So a covenant "to pay and discharge all taxes, rates, duties and assessments whatsoever which during the continuance of the demise should be taxed, assessed, or imposed on the tenant or landlord of the premises demised in respect thereof," was held to include the sum which the vestry had compelled the owner to pay them under the provisions of the Metropolitan Management Acts, 1856, 1862, as the proportionate part of the expense of paving the adjoining street under those acts. *Thompson v. Lupworth*, L. R., 3 C. P. 149. *Hartley v. Hudson*, 4 C. P. D. 367 (decided under the Public Health Acts, 1848, 1875), is to the same effect. So where the tenant covenanted to "bear, pay and discharge" "all other taxes, rates, duties and assessments whatsoever," which should be charged "on the said premises or any part thereof, or upon the landlord or tenant in respect thereof, or in respect of the said yearly rent;" *Budd v. Marshall*, 5 C. P. D. 481, C. A. (Public Health Act, 1875); or "all burthens, duties and services;" *Sweet v. Seager*, 2 C. B., N. S. 119 (Metropolis Management Act, 1855); or "all taxes, rates, assessments and outgoing whatsoever," "imposed upon the said demised premises," or "upon the landlord or tenant in respect thereof or on the rent thereby reserved;" *Crosse v. Raw*, L. R. 9 Ex. 209 (Sanitary Act, 1866, s. 10); *Aldridge v. Ferne*, 17 Q. B. D. 212; (Metropolis Management Acts, 1855, 1862); *Smith v. Robinson*, (1893) 2 Q. B. 53; *Foulger v. Arding*, (1902) 1 K. B. 700 C. A.; *In re Warriner*, (1903) 2 Ch. 367 (Public Health (London) Act 1891). So even where the covenant does not contain the above words in italics. S. C.: *Brett v. Rogers*, (1897) 1 Q. B. 525; *Furlow v. Stevenson*, (1900) 1 Ch. 128, C. A. See also *Greaves v. Whitmarsh*, (1906) 2 K. B. 340. The construction of the covenant is not affected by the shortness of the term. *Stockdale v. Ascherberg*, (1904) 1 K. B. 447, C. A.; *In re Warriner*, *supra*. But as to a yearly tenancy see *Harris v. Hickman*, (1904) 1 K. B. 13. See also *Midgley v. Coppock*, 4 Ex. D. 309, C. A. (decided between vendor and purchaser).

But under a covenant to pay "rates and assessments which, whether parliamentary, parochial, or otherwise now are or at any time during the said term shall be taxed, rated, charged, assessed, or imposed upon the said premises or any part thereof, or upon or payable by the occupier or tenant in respect thereof," it was held that a charge similar to that in *Thompson v. Lapworth*, *ante*, p. 743, must be borne by the landlord, as it was imposed on him in respect of the premises, and the tenant did not, by his covenant, relieve the landlord of this burthen. *Allum v. Dickinson*, 9 Q. B. D. 632, C. A.: *Wilkinson v. Collyer*, 13 Q. B. D. 1; *Baylis v. Jiggins*, (1898) 2 Q. B. 315. The decision in *Tidswell v. Whitworth*, L. R., 2 C. P. 326, decided on a local act, is to the same effect. See this case explained in *Thompson v. Lapworth*, L. R., 3 C. P. 149, 159. So under a similar covenant the lessor was held bound to bear the cost of work done by him under an order made on him under the Public Health Act, 1875, s. 94. *Rawlins v. Briggs*, 3 C. P. D. 368. See also *Bird v. Elwes*, L. R., 3 Ex. 225.

"The authorities on this subject are in a very unsatisfactory condition;" *Foulger v. Arding*, (1902) 1 K. B. 700, 709, *per* Romer L. J. But it seems that the principles to be deduced from them may be shortly summed up as follows:—Where the covenant includes only an obligation to make money payments to the local or other authorities, then, although the tenant is liable to reimburse the owner when the duty is primarily to pay money to the authorities (as in *Waller v. Andrews*, *Payne v. Burridge*, *Thompson v. Lapworth*, and *Hartley v. Hudson*, *ante*, p. 743), yet he is not liable where the owner is primarily bound to do the work himself, and it is only on his default that the authority could do the work and assess him (as in *Allum v. Dickinson*, *Wilkinson v. Collyer*, *Baylis v. Jiggins*, *Tidswell v. Whitworth*, and *Rawlins v. Briggs*, *supra*). The covenants may, however, be wide enough to cover the obligation to do work at the instance of the local authority. *Budd v. Marshall*, *Sweet v. Seager*, *Crosse v. Raw*, *Aldridge v. Ferne*, *Smith v. Robinson*, *Brett v. Rogers*, *Farlow v. Stevenson*, *Foulger v. Arding*, *Stockdale v. Ascherberg*, and *Greaves v. Whitmarsh*, *ante*, p. 743; a covenant to pay all "duties" or "outgoings," or "impositions charged upon the premises or the landlord in respect thereof," being sufficient for this purpose. S. CC. As to the construction of a covenant to pay rates levied on mines under the Rating Act, 1874, see *Chaloner v. Bolekow*, 3 Ap. Ca. 933, D. P. Where the lessor L. has himself done work required by the sanitary authority, he cannot recover its cost from the tenant as an "outgoing," unless L. was compellable to do the work. *Harris v. Hickman*, (1904) 1 K. B. 13.

Expenses under the Private Street Works Act, 1892, 55 & 56 V. c. 57, ss. 12, 13, become a charge on the premises on the completion of the work, although not payable until final apportionment; hence where the lease is between those dates, they do not come within a covenant to pay present and future assessments, outgoings, &c. *Surtees v. Woodhouse*, (1903) 1 K. B. 396, C. A. The same principle applies to expenses under the Public Health Act, 1875, ss. 150, 257, *vide post*, p. 745.

Where the "outgoing" is expenditure for work required by the Factory and Workshop Act, 1891, s. 7 (2) in respect of fire escape, *Horner v. Franklin*, (1905) 1 K. B. 479, C. A.; or by *Id.* 1901, s. 101 (8) in respect of an underground bakery, *Stuckey v. Hooke*, (1906) 2 K. B. 20, C. A., no action will lie in respect thereof between the parties on the covenant. See also the London Building Acts (Amendment) 1905, 5 E. 7, cap. ccix., s. 20.

An absolute covenant to pay rates is broken on non-payment, although no demand has been made on the tenant for payment. *Davis v. Burrell*, 10 C. B. 821.

Where the lessor covenants with the lessee to pay all rates and taxes already charged, or to be charged, on the premises, he is liable to pay them

only on the rent reserved, and not on the full improved value of the premises. *Watson v. Home*, 7 B. & C. 286; *Smith v. Humble*, 15 C. B. 321.

Breach of covenant for title.] The covenants for title, on which remedies are sought in the courts of common law, are principally the covenant that the grantor is seised in fee, or has power to convey; and the covenant for quiet enjoyment, express or implied, and freedom from incumbrances. By the Conveyancing and Law of Property Act, 1881 (44 & 45 V. c. 41), s. 7, in the case of conveyances on sale, mortgage, or settlement, or by a trustee, mortgagee, &c., executed after 31st Dec. 1881, the respective covenants which were usually inserted in such instruments are now implied. The breach of such implied covenants is ground of action, *Gt. W. Ry. Co. v. Fisher*, (1905) 1 Ch. 316. By sect. 7 (7), such covenants may be varied or extended by the instrument. The statement of claim alleges, by way of breach, that the defendant was not seised, or had not power, &c., at the time of the conveyance, or that some person who before and at the time of the conveyance by the defendant had, and still has, lawful right to the premises, &c., entered and evicted the plaintiff, or that the entry or other disturbance was by or under the defendant himself.

Proof that the defendant is in as heir of the lessor is sufficient to charge him as assignee of the reversion of a lease. *Derisley v. Custance*, 4 T. R. 75. See *sub tit. Action against heir and devisee, post*, pp. 1167 *et seq.*

A covenant for title by a vendor in fee does not extend to acts done previously to the last preceding sale. *David v. Sabin*, (1893) 1 Ch. 534, 544, *per* Lindley and A. L. Smith, L.J.J. Thus where A. sells and conveys land to B., his heirs and assigns, and covenants with them for title, and B. conveys the land to C., C. cannot sue A. in respect of an incumbrance affecting the land prior to the later conveyance. *Spoor v. Green*, L. R., 9 Ex. 99. Where the incumbrance affecting the land was a mining lease granted by A., prior to the conveyance to B., it was held that the breach was complete at the time of the conveyance to B., and that no fresh cause of action arose on the subsequent subsidence of the surface, owing to the working of the mines prior to the conveyance to C. S. C. Where the covenant was of seisin in fee, and the premises were, in fact, copyhold of inheritance, the damages are the difference in value between lands of each tenure. *Gray v. Briscoe*, Noy, 142. So where there was an implied covenant for a good right to convey, and part of the land was subject to a right of way, the damages are "the difference between the value of the property as purported to be conveyed and that which the vendor had power to convey." *Turner v. Moon*, (1901) 2 Ch. 825. See also *Gt. W. Ry. Co. v. Fisher*, (1905) 1 Ch. 316.

Liability under the Metropolitan Management Act, 1862 (25 & 26 V. c. 102), s. 77, to contribute to the expenses of paving a new road adjoining a house sold, is not an incumbrance on the property, although the expenses had been apportioned before sale. *Egg v. Blaney*, 21 Q. B. D. 107. Where however a similar liability arises under the Public Health Act, 1875 (38 & 39 V. c. 55) s. 150, it becomes under *Id.* s. 257 a charge on the premises as from the date of the completion of the works; *In re Bettesworth and Richer*, 37 Ch. D. 535; *In re Allen & Driscoll's Contract*, (1904) 2 Ch. 226, C. A.; although until the apportionment, there is no liability to pay; *In re Boor*, 40 Ch. D. 572; and under the Private Streets Works Act, 1892 (55 & 56 V. c. 57) ss. 12, 13, the charge and the liability to pay are the same as under 38 & 39 V. c. 55, *supra*. *Stock v. Meakin*, (1900) 1 Ch. 683 C. A.; *Surtees v. Woodhouse*, cited *ante*, p. 744.

On a covenant for quiet enjoyment generally, it will not support the breach to show a *tortious* disturbance by a stranger; for it is only a covenant against persons having lawful title; *Dudley v. Folliott*, 3 T. R. 587; 2 Wms. Saund. 178 (8); unless the covenant is against disturbance by a *particular person*,

when it is sufficient to show any disturbance by him, whether by lawful title or otherwise. *Nash v. Palmer*, 5 M. & S. 374. So, where the covenant is against disturbance by the lessor, his heirs or executors, it is sufficient to show any disturbance by him or them. *Forte v. Vine*, 2 Roll. Rep. 21; 1 Wms. Saund. 181 b, (g). Thus, where the lessor lets a seam of coal with covenant for enjoyment without molestation, &c., and he afterwards works minerals in the stratum above the coal, so as to damage the coal mine, an action lies for breach of covenant; though a mere nuisance by the lessor on his own land is not necessarily a breach of such a covenant. *Shaw v. Stenton*, 2 H. & N. 858; 27 L. J., Ex. 253. See further *Spoor v. Green*, *ante*, p. 745, and *Harrison v. Ld. Muncaster*, *post*, p. 747. Where the covenant is for quiet enjoyment against A. and any other person by his means, title, or procurement, it is sufficient proof of the breach to show an entry by A.'s wife, in whose name A. purchased jointly with his own. *Butler v. Swinerton*, Palm. 339. So, in the case of a covenant for quiet enjoyment against all claiming by, from, or under him, a claim of dower by his wife is a breach of the covenant. Godb. 333; Palm. 340. So, the appointee of A., by virtue of the power in the making of which A. concurred, is a person claiming under him. *Hurd v. Fletcher*, 1 Doug. 43; *Carpenter v. Parker*, 3 C. B., N. S. 206; 27 L. J., C. P. 78. So, where A., seised in fee, settled his estate upon himself for life, remainder to his first and other sons in tail, and made a lease, and covenanted for quiet enjoyment without interruption of the lessor, his heirs or assigns, or any other person claiming any estate, right or interest, by, from, or under him, the eldest son was held to be a person claiming under the lessor. *Evans v. Vaughan*, 4 B. & C. 261. Where the covenant is that the defendant has not done, permitted, or suffered any act, &c., the assenting to an act which the covenantor could not prevent is not a breach. *Hobson v. Middleton*, 6 B. & C. 296; *Thackeray v. Wood*, 6 B. & S. 766; 24 L. J., Q. B. 226. But where a mortgagee, who had entered into a similar covenant, was party to a deed whereby the mortgagor created an incumbrance on the mortgaged land, this is a breach of the covenant. See *Clifford v. Hoare*, L. R., 9 C. P. 362. A covenant for quiet enjoyment "acquitted of all grants, rents," &c., is broken by the existence of a quit rent, incident to the tenure, and due to the lord of the manor, though none was in arrear at the time of the conveyance. *Hammond v. Hill*, Comyn, 180. A covenant against interruption by the vendor, or his acts or defaults, extends to arrears of quit rent due while the vendor was in possession and unpaid by him, though it may have become due before he held the estate. *Howes v. Brushfield*, 3 East, 491. Entry on a lessee and distress for land-tax, due from lessor before the demise, is not a breach of covenant for quiet enjoyment, without disturbance by the lessor or any one claiming by, from, and under him; for that is not a claim under him, but a claim against him. *Stanley v. Hayes*, 3 Q. B. 105. But *semb.* the plaintiff might have paid the tax and sued for money paid. *Vide ante*, p. 596. Such a covenant is not broken by the re-entry by a superior landlord for non-payment of rent and non-repair under the conditions of his lease. *Kelly v. Rogers*, (1892) 1 Q. B. 910, C. A. *Secus* where the covenantor, although having a good defence, has consented to the re-entry. *Cohen v. Tanner*, (1900) 2 Q. B. 609, C. A. The entry of the party claiming lawful title is not less a breach of covenant because the covenantor, who sues, may have instigated him to enforce the claim. *Young v. Raincock*, 7 C. B. 310. Merely forbidding the plaintiff's tenant, A., to pay his rent, is not a breach of the covenant for quiet enjoyment. *Witchot v. Nine*, Brownl. & Gold. 81. But a notice by B. to A. to pay his rent to B., followed by payment, is a breach. *Edge v. Boileau*, 16 Q. B. D. 117.

A legal proceeding interfering, not with the possession, but with a particular mode of enjoyment of land, as its use as a beershop, was held not a breach

of the covenant. *Dennett v. Atherton*, L. R., 7 Q. B. 316, Ex. Ch.; see *Porter v. Drew*, 5 C. P. D. 143. In *Sunderson v. Berwick Cor.*, 13 Q. B. D. 547, 551, it was however stated in every case to be a question of fact whether the quiet enjoyment of the land has, or has not, been interrupted, and where its ordinary and lawful enjoyment has been so substantially interfered with by the acts of the covenantor or those lawfully claiming under him a right to do the particular act complained of, (1891) 2 Q. B. 682, *per* Ld. Esher, M. R.; *accord. Williams v. Gabriel*, (1906) 1 K. B. 155, 158, the covenant is broken, although neither the title to the land, nor the possession of the land is otherwise affected. *Accord. Robinson v. Kilvert*, 41 Ch. D. 88, 97, *per* Lindley, L.J.; *Aldin v. Latimer, &c., & Co.*, (1894) 2 Ch. 437. But this statement "must be taken with reference to the facts then before the Court, which were that water was poured on the land demised so as to interfere with its enjoyment." *Manchester, &c., Ry. Co. v. Anderson*, (1898) 2 Ch. 394, 402, *per* Lindley, M.R. So the flooding of the plaintiff's warehouse, see *Anderson v. Oppenheimer*, 5 Q. B. D. 602; or his mine; see *Harrison v. Id. Muncaster*, (1891) 2 Q. B. 680, C. A.; is an interference with its quiet enjoyment. The interruption must be "caused either by a direct act of interruption by the defendant himself, or by some act the consequence of which, it either was foreseen, or ought, if reasonable care had been exercised, to have been foreseen, would be an interruption." S. C. *Id.* 686. In *Tebb v. Cave*, (1900) 1 Ch. 642, it was held that the erection by the lessor of a wall so near the chimneys of the demised house as to make them smoke was a breach of the covenant for quiet enjoyment. *Sed quare*, for the interference was not here direct, see *Davis v. Town Properties Investment Cor.*, (1903) 1 Ch. 797, 805, *per* Romer & Cozens Hardy, L.JJ. Where S. let land to B., who subsequently surrendered his lease to S., after having, without S.'s knowledge, underlet a part to X. by way of mortgage, and S. then sold the land with the usual covenants (see 44 & 45 V. c. 41, s. 7 (a)) to B., under whom D. claimed, it was held that the under-lease constituted a breach of the covenants for quiet enjoyment and against incumbrances, under which D. could sue S. *David v. Sabin*, (1893) 1 Ch. 523, C. A. It is no answer to such action that S. was induced by the fraud of B. in concealing the under-lease to execute the conveyance to him, for the action arises from privity of estate. S. C. A mere nuisance, *e.g.*, noise committed or allowed by the lessor, has been held not to be a breach of the covenant. *Jenkins v. Jackson*, 40 Ch. D. 71. See also *Manchester, &c., Ry. Co. v. Anderson*, (1898) 2 Ch. 394, *per* C. A.

A covenant not to use lands for certain specified trades, does not imply a warranty that it may be used for all other trades. S. C.

In a conveyance of land from A. to B., A. covenanted with B. for title and quiet enjoyment, notwithstanding any act or thing done or suffered by him, or any of his ancestors or predecessors in title: by a subsequent decree in Chancery, which bound B., although not a party to the suit, the land was declared subject to rights of common; this decree was, in the absence of any actual disturbance of B. in his possession, held no breach of the covenant for quiet enjoyment; nor, in the absence of evidence of a grant of common by A.'s predecessors in title, was it a breach of the covenant for title. *Howard v. Maitland*, 11 Q. B. D. 695, C. A. A covenant for title applies to all defects of title within it, even although the defects appear on the conveyance; or are otherwise known to the purchaser. *Page v. Midland Ry. Co.*, (1894) 1 Ch. 11, C. A.; *May v. Plant*, (1900) 1 Ch. 616; *Gl. W. Ry. Co. v. Fisher*, (1905) 1 Ch. 316.

For an instance of a qualified covenant for title, where a house is granted with appurtenances, as usually enjoyed therewith, see *Thackeray v. Wood*, *ante*, p. 746. As to breach of quiet enjoyment of stalls in a theatre, see *Leader v. Moody*, L. R., 20 Eq. 145.

A covenant in the usual form, that "the lessee paying the rent and observing the covenants on his part to be observed, should peaceably hold and enjoy the said premises," is an independent covenant, and non-payment of rent and non-observance of the lessee's covenant is no answer to a breach by the lessor. *Dawson v. Dyer*, 5 B. & Ad. 584; *Edge v. Boileau*, *ante*, p. 746.

The defendant granted the plaintiff a lease he had no power to grant. The plaintiff obtained a fresh lease from the person having good title, and in an action against the defendant, on the covenant for quiet enjoyment, he was held entitled to recover the difference in the expenses and value of the void and of the valid lease. *Lock v. Furze*, 19 C. B., N. S. 96; 34 L. J., C. P. 201; L. R., 1 C. P. 441, Ex. Ch. So, where defendant demised premises to the plaintiff, and covenanted that the plaintiff should occupy them, through the term, without any interruption from the defendant, or any person claiming under him, an action of trespass was brought against the plaintiff by C., who claimed under the defendant, and the plaintiff gave notice of this action to the defendant, but the defendant took no notice thereof; the plaintiff then defended the action, and a verdict was recovered against him; it was held, that the plaintiff was entitled to recover against the defendant the amount of the verdict and costs he was so compelled to pay, together with his cost of defence, and compensation for the loss of the land, and the value of a conservatory he had erected on the land. *Rolph v. Crouch*, L. R., 3 Ex. 44. See also *Gt. W. Ry. Co. v. Fisher*, *ante*, p. 747; and *Godwin v. Francis*, cited *ante*, p. 493. And in such case the expenses of removal into other premises seem to be recoverable, see *Grosvenor Hotel Co. v. Hamilton*, (1894) 2 Q. B. 836, C. A. Where there had been no eviction, only such damages were recoverable as the plaintiff had sustained at the date of the writ. *Child v. Stenning*, 11 Ch. D. 82, C. A. In such case, however, the damages would now, under O. xxxvi. r. 58, *ante*, p. 311, "be assessed down to the time of assessment."

Where a breach is not assigned in the words of the covenant merely, but goes on to particularize the sort of breach, that alone must be proved; *Harris v. Mantle*, 3 T. R. 307; unless the judge shall authorize an amendment on the trial by striking out words of needless particularity; *ante*, p. 735. Where the breach of a covenant for enjoyment specifies an entry and expulsion by the defendant, it is not enough to prove a refusal by the defendant to let the plaintiff take possession. *Hawkes v. Orton*, 5 Ad. & E. 367. But where the first part of the breach contains the gist of the action, the plaintiff need not prove superfluous matter of aggravation. *Deffell v. Brocklebank*, 4 Price, 36.

The plaintiff may assign a breach on the implied covenant for quiet enjoyment contained in the word *demise*; Com. Dig. Cov. (A. 4); Shep. Touch. 160; in a lease under seal this word implies a power to lease, and hence to support the action it is not necessary that the lessee should be actually evicted; 1 Wms. Saund. 322 a, (2). The word *let* has in this respect the same effect as *demise*. *Mostyn v. W. Mostyn Coal and Iron Co.*, 1 C. P. D. 145. See *Budd-Scott v. Daniell*, (1902) 2 K. B. 351, dissenting from the dicta of Kay, L.J., in *Baynes v. Lloyd*, (1895) 2 Q. B. 614. The implied covenant ceases with the estate out of which the lease is granted. S. C., (1895) 1 Q. B. 820; 2 *Id.* 610, C. A.; *Adams v. Gibney*, 6 Bing. 656; see *Penfold v. Abbott*, 32 L. J., Q. B. 67; and is restrained by an express covenant for quiet enjoyment. *Line v. Stephenson*, 4 N. C. 678; Ex. Ch., 5 N. C. 183; *Stannard v. Forbes*, 6 Ad. & E. 572; *Dennett v. Atherton*, L. R., 7 Q. B. 316, Ex. Ch. A warranty of the demise by the lessor is not an implied covenant, but an express one, and extends to the whole term granted. *Williams v. Burrell*, 1 C. B. 402.

In a demise by parol there is from the mere relation of landlord and tenant an implied contract for quiet enjoyment, but not for good title. *Bandy v.*

Cartwright, 8 Exch. 913; 22 L. J., Ex. 285, and xl. note; *Hall v. City of London Brewery Co.*, 2 B. & S. 737; 31 L. J., Q. B. 257; *Cross v. Warter*, (1870) W. N. 137, E. T., Q. B.; *Budd-Scott v. Daniell*, *ante*, p. 748. Whether there has been a breach of such contract is a question of fact. S. C. But, in an agreement for a lease there is no contract for quiet enjoyment; *Brashier v. Jackson*, 6 M. & W. 549; it is, however, an implied condition that the lessor has a good title to let for the proposed term, and he is liable for a breach of this condition. *Stranks v. St. John*, L. R., 2 C. P. 376. A person having only an *interesse termini* cannot maintain an action for quiet enjoyment against the grantor, *Wallis v. Hands*, (1893) 2 Ch. 75; but he may bring an action against him for not putting him into possession; S. C. *Id.* 85; *Coe v. Clay*, 5 Bing. 440; *Jinks v. Edwards*, 11 Exch. 775. A mere agreement for a lease will not support such an action. *Drury v. Macnamara*, 5 E. & B. 612; 25 L. J., Q. B. 5, unless specific performance could be granted, for in such case damages may be granted as an alternative remedy. *Vide ante*, p. 326. See further *Lease v. Courtney*, (1904) 2 Ch. 503. A tenant may sue his landlord, G., for injury to the demised house, by vibration caused by G.'s machines on adjacent land, although the house was unusually weak. *Grosvenor Hotel Co. v. Hamilton*, (1894) 2 Q. B. 836, C. A.

[Breach of covenant to yield up possession of premises at end of term.] A covenant to this effect is usually to be found in leases; but even in the absence of such a covenant, "when a lease is expired the tenant's responsibility is not at an end, for if the premises are in possession of an under-tenant, the landlord may refuse to accept the possession, and hold the original lessee liable; for the lessor is entitled to receive the absolute possession at the end of the term." *Harding v. Crethorn*, 1 Esp. 57, *per* Ld. Kenyon; approved in *Christy v. Tuncred*, 7 M. & W. 127, 130, *per* Parke, B. The same rule applies in the case of a tenancy under a parol agreement for a lease. *Henderson v. Squire*, L. R., 4 Q. B. 170. The landlord is entitled to recover all the loss he has sustained by not being put in possession of the entire premises at the end of the term; he is entitled to a sum equivalent to the rent he has lost, and to the costs of an ejectment against an under-tenant, who has wrongfully held over. S. C. So, the lessor may recover for damages occasioned by having to compromise an action, by a person (to whom he had let in reversion), for not giving possession, together with the costs of such action; and his acceptance of rent for the time held over is no answer. *Bramley v. Chesterden*, 2 C. B., N. S. 592; 27 L. J., C. P. 23. As to damages for not delivering up fixtures at the end of the term, see *Watson v. Lane*, *ante*, p. 739.

[Action on other covenants relating to land.] Questions often arise, in other cases than those between lessor and lessee, as to when the benefit of a covenant relating to land made with the owner of the land enures to his successors in title, and when the burthen of such a covenant made by the owner falls on his successors in title, but to deal with this subject is beyond the scope of this work. The matter will be found fully discussed in the notes to *Spencer's case*, 1 Smith, L. C., 11th ed. pp. 75 *et seq.* See further *Osborne v. Bradley*, (1903) 2 Ch. 446, and *In re Nisbet & Potts*, (1906) 1 Ch. 386, C. A. A covenant to convey land at a time beyond the period allowed by the rule against perpetuities cannot be enforced by a decree for specific performance, but an action for damages will lie for its breach. *Worthington Cor. v. Heather*, (1906) 2 Ch. 532. As to the effect of a covenant by a lessee G., in an underlease by him to D., to perform the covenants in G.'s head lease, so far as relates to premises not demised to G., see *Dewar v. Goodman*, (1907) 1 K. B. 612.

ACTION FOR DOUBLE VALUE OF LAND DEMISED.

By the Landlord and Tenant Act, 1730, 4 G. 2, c. 28, s. 1, in case any tenant for life, lives, or years, or other person who shall come into possession of any lands, tenements, or hereditaments, by, from, or under, or by collusion with such tenant, shall *wilfully* hold over any lands, &c., after the determination of such term, and after demand made, and notice *in writing* given, for delivering the possession thereof by his landlord or lessor, or the person to whom the remainder or the reversion of such lands, &c., shall belong, or his agent thereunto lawfully authorized, such person so holding over shall, for the time he shall so hold over or keep the person entitled out of possession of the said lands, &c., pay to the person so kept out of possession, his executors, administrators, or assigns, at the rate of *double the yearly value*, of the lands, &c., so detained, for so long a time as the same are detained, to be recovered by action of debt in one of the King's Courts of Record.

The landlord may also sue for a breach of the implied agreement to give up possession of the premises at the end of the term. *Vide ante*, p. 749.

Proof of the demise.] Tenants in common could not sue jointly in this action, where there was no joint demise by them. *Wilkinson v. Hall*, 1 N. C. 713. Nor could husband and wife sue jointly on a parol demise, by the husband alone, of land whereof he is seised in right of his wife, but the action must be brought by the husband alone. *Harcourt v. Wyman*, 3 Exch. 817. But such misjoinder is not now material; *vide ante*, pp. 89 *et seq.* A., the lessor of defendant, required delivery of the premises at Lady-day, when the lease ended, and then made a lease in reversion to B.: defendant held over, and did not recognize B. as landlord: held that A., and not B., was the proper person to sue. *Blatchford v. Cole*, 5 C. B., N. S. 514; 28 L. J., C. P. 140. A weekly tenant is not liable to the action. *Lloyd v. Rosbee*, 2 Camp. 453.

Proof of the determination of the term, and of the demand.] In general, the determination of the term will be proved by evidence of the service of a notice to quit upon the defendant; and if such notice be proved, it will not be necessary to show a demand; for the notice includes a demand. *Wilkinson v. Colley*, 5 Burr. 2694. A notice to quit, containing a threat of requiring double *rent* on refusal, is sufficient. S. C. As to proof of the notice or demand, see *ante*, pp. 3, 14, and cases cited *Action for recovery of land*,—*By landlord*, *post*, pp. 1020 *et seq.* The statute requires it to be in writing. Where the defendant has held over after the determination of a term certain, a demand in writing of the possession must be proved; but it need not appear that the demand was made immediately upon the expiration of the tenancy; *Cobb v. Stokes*, 8 East, 361; though the plaintiff will only be entitled to the double value from the time of the demand made. And where the rent is reserved quarterly, and the demand is made in the middle of the quarter after the expiration of the tenancy, the plaintiff cannot recover the single rent for the antecedent fraction of the quarter. S. C. Where the notice was served upon a tenant, a feme sole, who married before the expiration of the year, it was held that the landlord might maintain debt against the husband, without making a demand of the possession from him; and that in such action it was not necessary to join the wife for conformity. *Lake v. Smith*, 1 N. R. 174. A person appointed by the Court of Chancery to receive the rents and profits of the estate, is a sufficient agent within the

statute to make the demand in his own name. *Wilkinson v. Colley, ante*, p. 750. Where a trustee joined with *cestui que trust* in a mortgage to the plain iff, and all parties joined in appointing G. to be the agent and attorney of the *cestui que trust* to demand and collect rent, to give notice to quit, &c., and to do everything that the *cestui que trust* could have done before the mortgage, it was held that G. was authorised to demand within the statute. *Poole v. Warren*, 8 Ad. & E. 582.

[*Value.*] In estimating the value, only the land and its real easements and appurtenances can be included. Thus, where the owner of a mill let part of it to the defendant, with the use of the revolving shaft of a steam-engine, which passed through the part demised, at an entire rent, the value of the power was excluded. *Robinson v. Leavoyd*, 7 M. & W. 48. Generally speaking, the rent, if a rack-rent, will represent the value; but the unwillingness of the tenant to quit may sometimes be evidence of a greater value.

Defence.

It has been usual in this action to traverse the specific allegations in the statement of claim; but as the action is in the nature of a penal one, it has been suggested that the plea of not guilty by statute (*post*, p. 757) is sufficient to put the plaintiff on proof of the whole statement of claim. See *Jones v. Williams*, 4 M. & W. 375. *Contra, Castleman v. Hicks*, 2 M. & Rob. 422, *cor. Coleridge, J., post*, p. 758.

The defendant may show that the plaintiff has waived the notice to quit or demand of possession, and, where the plaintiff has accepted rent due from the defendant after the expiration of notice to quit, it is a question for the jury whether such rent was received in part satisfaction of the double value, or as a waiver of it. *Ryall v. Rich*, 10 East, 52. Such waiver need not be specially pleaded. *Rawlinson v. Marriott*, 16 L. T. 207, Mellor, J. Where the landlord declared in debt, first for the double value, and secondly for use and occupation, and the tenant pleaded *nil debet* to the first count, and, a tender of the single rent before action brought to the second, and paid the money into court, which the plaintiff took out of court, and proceeded; it was held that this was no waiver of the plaintiff's right to the double value, so as to be ground of non-suit, but that it was a case to go to the jury, and that the plaintiff's going on with the action, after taking the single rent out of court, was evidence to show that he did not mean to waive his claim for the double value, but to take the single rent *pro tanto* only. *Ryall v. Rich, supra*. A recovery of possession in an action is no waiver of the landlord's right to the double value for the time between the expiration of the notice to quit and the time of recovering possession. *Soulsby v. Neving*, 9 East, 310. A tenant who holds over under a fair claim of right will not be considered as wilfully holding over within the statute, though it may appear eventually that he had no right. *Wright v. Smith*, 5 Esp. 203. A tenant who, during proceedings as to the validity of a devise made by the lessor, held over after a notice to quit from the devisee to whom he had in the first instance attorned and paid rent, was held not to have made himself liable to a claim for double value after the validity of the devise had been established. *Swinfen v. Bacon*, 6 H. & N. 184, 846; 30 L. J., Ex. 33, 368. Where the action is against co-tenants, a statement by one, on receipt of notice to quit, that "he has nothing to do with the land," is not evidence in his favour to show that his holding was not wilful; but if one offer to give up the land, and the other alone holds out, it is doubtful whether the action will lie against both. *Hirst v. Horn*, 6 M. & W. 393.

Statute of Limitations.] This double value being in the nature of a penalty, can only be recovered within two years of the time the cause of action accrued. 3 & 4 W. 4, c. 42, s. 3, *post*, p. 757.

ACTION FOR DOUBLE RENT.

By the Distress for Rent Act, 1737, 11 G. 2, c. 19, s. 18, if any tenant shall give notice of his intention to quit the premises holden by him, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, then such tenant, his executors or administrators, shall thenceforward pay to the landlord double the rent or sum which he should otherwise have paid, to be levied, sued for, and recovered at the same times and in the same manner as the single rent or sum, before the giving of such notice, could be levied, &c.; and such double rent or sum shall continue to be paid during all the time such tenants shall continue in possession. The action has usually been in the form of debt.

The notice mentioned in this statute need not be in writing, at least where the tenant holds under an oral demise; *Timmins v. Rowlinson*, 3 Burr. 1603; but it must give a fixed time for quitting; thus a notice to quit "as soon as the tenant can get another situation" does not render him liable on this statute, though he has got another situation. *Farrance v. Elkington*, 2 Camp. 591. The statute only applies to those cases in which the tenant has the power of determining his tenancy by a notice, and actually gives a valid notice sufficient to determine it. *Johnstone v. Huddestone*, 4 B. & C. 922. It was held by Best, C.J., that this action did not lie against a weekly tenant. *Sullivan v. Bishop*, 2 C. & P. 359. This decision was, however, against his own view, and in deference to the decision of Ld. Ellenborough in *Lloyd v. Rosbee*, *ante*, p. 750, which was, however, a claim for double value, and, it seems, having regard to the difference in the two statutes, that the decision in *Sullivan v. Bishop*, *supra*, is incorrect. See Bullen on Distress, 2nd ed., 135, n.

This action is not in the nature of a penalty.

ACTION ON BOND.

The statement of claim either states only the penal part of the bond, as in the case of common money bonds, or sets out also the special conditions and alleges breaches. The allegation of breaches is obligatory on the plaintiff by stat. 8. & 9 W. 3, c. 11, s. 8, either in the statement or reply, by way of *assignment*, which is traversable, or, in certain cases, by way of *suggestion*, which is not traversable, but must be proved in order to obtain an assessment of damages. Neither the J. Acts, 1873, 1875, nor the Rules, 1883, materially affect the procedure on bonds. Where breaches are not assigned in the statement of claim, the defendant must now set out the condition as part of his defence, if he intends to plead performance. Where issue is joined on the alleged breaches, the proof will, of course, depend on the allegations traversed. Where breaches are *suggested*, then the evidence will be as on a writ of inquiry, except that the truth of the breaches as well as the damages, will then have to be inquired into, and thereupon the defendant may controvert the breaches or any of them; but he cannot

show excuse of performance, for that might have been pleaded by him at first. See *Canterbury, Archbishop of v. Robertson*, 1 Cr. & M. 690; *Webb v. James*, 8 M. & W. 645.

Where the breaches have been *suggested* after judgment for the plaintiff, it will be necessary to give some evidence that the bond produced, and in which the conditions are contained, is the same as that on which judgment has been obtained; for this purpose it will be sufficient if the solicitor for the plaintiff testify that the bond produced is the instrument delivered to him to bring the action on, and that he knows of no other of the same date, and the bond need not be strictly proved. *Hodgkinson v. Marsden*, Peake, Ev. 5th ed. 287; 2 Camp. 122. Where the defendant on *oyer* set out the condition, which was for performance of covenants in an indenture of lease, and pleaded a plea of judgment recovered, on which there was judgment for the plaintiff; on the execution on the writ of inquiry, Ld. Kenyon ruled that it was not necessary to prove the execution of the lease, as the defendant was estopped from denying it. *Collins v. Rybot*, 1 Esp. 157. If the defendant let judgment go by default, and the plaintiff thereupon made his *suggestion* of breaches in which he sets out the condition of the bond, which appears to be for the performance of an award, or of articles of agreement, or the like, the plaintiff must prove the condition of the bond, the award, indenture, or articles, as well as the breaches suggested. *Edwards v. Stone*, *coram* Lawrence, J., 1 Wms. Saund. 58 f (1). But where the breaches are *assigned*, and not denied, the truth of them is not in issue.

As to stamps on bonds, *vide ante*, p. 246.

Damages.] The jury are to find nominal damages and costs, as well as damages on the breaches, but the plaintiff cannot recover more than the amount of the penalty and costs. *Wilde v. Clarkson*, 6 T. R. 303; *Branscombe v. Scarborough*, 6 Q. B. 13. Interest is payable, as such, on a common money bond, although not expressly reserved. *Farquhar v. Morris*, 7 T. R. 124; if reserved, then at the reserved rate; *In re Dixon*, (1900) 2 Ch. 561; C. A.

Where a certain sum is due from A. to B., and they agree that A. shall, in satisfaction thereof, pay a lesser sum on a given day, and in default of payment, the whole original debt shall at once become payable, B. is entitled on default to recover the debt. *Hudson v. Thompson*, L. R., 4 H. L. 1. So where the debt is to be repaid by instalments, and the whole to become payable on default in payment of one instalment. *Protector Endowment, &c. Co. v. Grieve*, 5 Q. B. D. 592, C. A.; *Wallingford v. Mutual Society*, 5 Ap. Ca. 685, D. P.

Defence.

Denial of execution.] This defence has the same effect as in actions on covenants, as to which see *ante*, p. 716.

The defendant may be sued by the name in which he executed the bond; but he may also, it seems, be sued by his real name; for where the writ was against W. B., and the declaration called him "W. F. B., sued by the name of W. B., and the bond was executed by the defendant, W. F. B., in the name of W. B., by which he was then known, it was held no variance; and it was also held that, if the wrong name had avoided the bond, it should have been specially pleaded. *Williams v. Bryant*, 5 M. & W. 447.

Alteration of the bond.] The cases relating to the alteration of bonds are collected with those relating to simple contracts, *ante*, pp. 661 *et seq.*

Payment.] Payment *before* the day fixed for it was always evidence of a plea of payment *at* the day. B. N. P. 174. But before stat. 4 & 5 A., c. 3 (c. 16, Ruff.), s. 12, payment *after* the day fixed, or at a different place from that fixed, was not pleadable in bar. By that act, payment of principal and interest, due on a mere money bond, made before action, is a bar, though not made exactly according to the condition. A *tender* without acceptance after the day is not within the statute, and therefore no bar. *Underhill v. Matthews*, B. N. P. 171. But see *per* Abbott, C.J., in *Murray v. Stair*, *El. of*, 2 B. & C. 92. Though the Limitation Act, 1623, 21 J. 1, c. 16, did not apply to specialities, yet the defendant might, if the deed were twenty years old, and there had been no payment of interest or acknowledgment of liability within that period, have pleaded *solvit ad diem*, and relied upon the presumption of payment arising from lapse of time. But if there had been any such payment of interest or acknowledgment, after the day appointed for the payment of the money, though upwards of twenty years had elapsed since the payment or acknowledgment, the defendant could not avail himself of this presumption of payment, under the plea of *solvit ad diem*, though he might under the plea of *solvit post diem*, given by the statute 4 & 5 A., c. 3, *supra*. *Moreland v. Bennett*, Str. 652; B. N. P. 174; see further, on presumption of payment, *ante*, pp. 37, 38.

In an action on a common money bond or on an annuity bond, it rests on the defendant to prove a defence of payment, although such defence is in fact a denial of the breach of the condition. *Penny v. Foy*, 8 B. & C. 8, 13.

Accord and satisfaction.] Accord and satisfaction, though not a good legal defence to an action on a bond, is good in equity. *Webb v. Hewitt*, 3 K. & J. 438; *Steeds v. Steeds*, 22 Q. B. D. 537. But accord and satisfaction with a joint obligee, is no defence, unless the presumption be rebutted that the money was advanced by the obligees as tenants in common and not as joint tenants. S. C. See *Powell v. Brodhurst*, (1901) 2 Ch. 160, 164, *per* Farwell, J.

Fraud.] *Vide ante*, p. 663.

Statutes of Limitations.] *Vide ante*, pp. 719 *et seq.*

ACTION ON REPLEVIN BOND.

The procedure in granting replevin bonds is now regulated by the County Courts Act, 1888 (51 & 52 V. c. 43), Part VI.

By sect. 134, the powers and responsibilities of sheriffs with respect to replevin bonds and replevins have ceased, and the county court registrar of the district in which the distress was taken is authorized to "approve of" replevin bonds, to grant replevins, and to issue all necessary process in relation to them, to be executed by the high bailiff. By sects. 134, 135, the registrar, at the instance of the party, takes security (in a bond with sureties, sect. 108 (*post*, p. 755), or a pecuniary deposit, sect. 109), conditioned to commence an action in the High Court, within a week after the date of the security, and to prosecute it with effect and without delay, and (unless

judgment be by default) to prove to such court that the obligor had good ground for believing either that the title to some hereditament, toll, market, fair, or franchise was in question *or* that the rent or damage exceeded 20*l.*, and to make return of the goods, if the return be adjudged.

Sect. 136 provides for prosecuting the suit in the county court on a like security, with a condition to prosecute it within one month with effect and without delay, and to make return, &c.

By sect. 137, the defendant may remove a replevin suit out of the county court by *certiorari* on giving security, by like bond, or by deposit (ss. 108, 109), approved of by a master of the Supreme Court, to "defend with effect" *and* (except in case of discontinuance, non. pros. or nonsuit) to prove that he had good ground for believing that either the title to some hereditament, toll, &c., was in question, *or* that the rent or damage, in respect whereof the distress was taken, exceeded 20*l.*

By sect. 108, the security is in the form of a bond with sureties "to the other party or intended party in the action or matter:" the court in which the action is brought, may, by order, give such relief to the obligors as may be just, which shall have the effect of a defeasance of the bond.

By County Court Rules, 1903, O. xxix., r. 3, "the bond shall be executed in the presence of the judge or registrar, or of a commissioner to administer oaths, or of a clerk to the registrar nominated to take affidavits."

By the C. L. P. Act, 1860, ss. 23, 24, the plaintiff in replevin might, in answer to an avowry, pay money into court, and such payment did not work a forfeiture of the bond. These sections, however, are repealed by stat. 46 & 47 V. c. 49; and the Rules, 1883, do not make any provision for such payment into court in replevin, as O. xxii. rr. 1, 9, *ante*, pp. 74, 75, do not apply. It seems, therefore, that this practice is no longer in force, for it is not retained by the saving in 46 & 47 V. c. 49, s. 5, or by O. lxxii. r. 2, *ante*, p. 1, n.; see *In re Busfield*, 32 Ch. D. 123, 132, C. A.; *Hume v. Somerton*, 25 Q. B. D. 239. A new procedure, where goods are detained under a lien, is given by O. l. r. 8.

The above provision in the County Courts Act, 1888, entirely extinguish the functions of the sheriff in replevin, and are much more extensive than the provisions of the original County Courts Act, 1846 (9 & 10 V. c. 95), ss. 119—121. They closely follow the County Courts Act, 1856 (19 & 20 V. c. 108), ss. 63—71.

Denial of execution.] This defence only puts in issue the due execution of the bond by the defendants. *Vide ante*, p. 716.

The forms of bond prescribed by the County Court Rules, 1903, are provided in the Appendix thereto, Forms, Nos. 287, 288. These forms have an attestation clause, and O. xxix., r. 3, *supra*, requires the bond to be executed in the presence of the County Court judge, &c., and as these rules were made under the powers conferred by the County Courts Acts, 1888, 1903, s. 164, it seems that attestation is necessary to the validity of the bond, and it must therefore in general be proved by the evidence of the attesting witness. *Vide ante*, p. 132.

The approval of the security by the county clerk, or other officer, is recited in the bond, and is, therefore, it seems, admitted by the obligors.

The bond is now free from stamp duty, in Ireland, only: *vide ante*, pp. 246, 247.

Forfeiture of the bond.] Where the bond is to prosecute in a superior court, the defendants may have to show, besides the due prosecution of the replevin suit, &c., that the plaintiff in replevin satisfied the court at the trial (if there were one) that he had good ground for belief that title was in

question, or that the rent or damage exceeded 20*l*. For this purpose, it should seem that the plaintiff in the replevin suit should prove or produce some declaration or certificate to that effect by the judge who tried it. See *Tunncliffe v. Wilmot*, 2 Car. & K. 626, where the certificate was refused by Patteson, J., on particular grounds; see *post*, p. 1089.

With regard to the prosecution with effect and without delay, the old decisions appear to apply. Thus to prosecute "with effect" means to a "not unsuccessful termination." *Jackson v. Hanson*, 8 M. & W. 477; *accord. Tammons v. Ogle*, 6 E. & B. 571; 25 L. J., Q. B. 403. The obligation to prosecute "without delay" is broken by not proceeding with due diligence, though the suit is not thereby determined. *Harrison v. Wardle*, 5 B & Ad. 146. And it is no defence that the delay was justified by the practice of the court, or by successive orders for time to deliver statement of claim; but the jury may find delay notwithstanding. *Gent v. Cutts*, 11 Q. B. 288. The abatement of the suit by death of the distrainee is a sufficient excuse. *Morris v. Matthews*, 2 Q. B. 293.

Damages.] The verdict is taken for the amount of the penalty; and this, it seems, with costs of suit, still limits the amount that can be afterwards actually recovered from the defendants. *Branscombe v. Scarborough*, 6 Q. B. 13.

ACTION FOR PENALTY.

Actions on statutes for penalties have been usually in the form of actions of debt. In some cases that form is prescribed by the statute; in other cases, where no form is specified, the penalty has been treated as a statute debt when incurred, though not strictly referable to any contract. In the statement of the offence it is sometimes necessary to allege a contract, and such contract must then be proved as laid. But variances in such actions are amendable, and will be amended where justice requires.

In an action of debt on a penal statute the general evidence for the plaintiff is—proof of the commission of the act upon which the penalty has accrued, and if a time be limited by the statute for bringing the action, proof that the action was brought within the time. Evidence of the locality of the cause of action is no longer material at the trial. *Vide ante*, p. 93.

As to the *onus* of proof, where the penalty arises from the commission of an act without legal qualification, the existence of which qualification is peculiarly within the knowledge of the defendant, *vide ante*, pp. 95, *et seq.* In a penal action under an old Act for exercising a trade, without having served an apprenticeship, the plaintiff was not compelled to prove that the defendant used the trade all the time laid in the declaration: it being averred that he forfeited 40*s*. for each month. *Powell v. Farmer*, Peake, 57. In *Hodkinson v. Mayer*, 6 Ad. & E. 194, it was held that an attorney, who practised in a county court, after having omitted for a year to take out his certificate, was not liable to penalties under statute 12 G. 2, c. 13, s. 7, as a person practising in the county court, without having been legally admitted according to stat. 2 G. 2, c. 23. A person, being deputy clerk of the peace, and acting as attorney, was not liable to penalties under 22 G. 2, c. 46, s. 14, if he abstained from the actual exercise of his office. *Faulkner v. Chevell*, 10 Ad. & E. 76.

The crown alone can sue for the penalty where the statute does not say who shall recover it, unless an interest therein is given to some person by the statute, expressly or by sufficient implication, as if it be created for the benefit of a party grieved. *Clarke v. Bradlaugh*, 8 Ap. Ca. 354, D. P. It is not necessary to prove an authority from the crown or the person entitled to the penalties. *Cole v. Coulton*, 2 E. & E. 695; 29 L. J. M. C. 125. A corporation cannot maintain the action unless empowered to do so by statute. *St. Leonards, Guardians of v. Franklin*, 3 C. P. D. 377.

Evidence of commencement of the action.] The writ is, in all cases, the commencement of the action, and the statement of claim will show the day on which it is issued; but where the writ has been renewed, strict proof of the continuance of the writ is requisite. *Vide ante*, p. 677. Where the writ is dated on the day on which the penalty was incurred, evidence is admissible to prove that it issued after the cause of action accrued. *Clarke v. Bradlaugh*, 8 Q. B. D. 63, C. A., reversed in D. P., 8 Ap. Ca. 354, on another ground.

By 31 El. c. 5, s. 5, actions or suits for forfeitures on a penal statute, limited to the Queen, must be brought within two years after the cause of action; and actions for penalties given to a common informer, suing *qui tam*, must be brought within one year. In *Dyer v. Best*, L. R., 1 Ex. 152, over-ruling *Calliford v. Blawford*, 1 Show. 353, this section was held to limit an action for a penalty, brought by an informer suing for himself alone, to one year; this decision was, however, disapproved by Bramwell, L.J., in *Robinson v. Currey*, 7 Q. B. D. 465, 471.

By the Civil Procedure Act, 1833, 3 & 4 W. 4, c. 42, s. 3, all actions for penalties, damages, or sums of money given by existing or future Acts to parties grieved, must be brought within two years after the cause of action.

An officer of the Goldsmiths' Company suing for penalties under stat. 7 & 8 V. c. 22, s. 3, is not a common informer within 31 El. c. 5, s. 5, *supra*, nor a party grieved within 3 & 4 W. 4, c. 42, s. 3. *Robinson v. Currey*, 7 Q. B. D. 465, C. A. Nor is an action brought under 53 & 54 V. c. 64, s. 3, *post*, pp. 846, 847, by a shareholder in a company against a director for misrepresentation, within 3 & 4 W. 4, c. 42, s. 3. *Thomson v. Ld. Clanmorris*, (1900) 1 Ch. 718, C. A.

Defence.

By the Limitation Act, 1623, 21 J. 1, c. 4, s. 4, "if any information, suit, or action shall be brought or exhibited against any person or persons, for any offence committed or to be committed against the form of any penal law, either by or on the behalf of the king, or by any other, or on behalf of the king and any other, it shall be lawful for such defendants to plead the general issue, that they are not guilty, or that they owe nothing, and to give such special matter in evidence to the jury that shall try the same, which matter, being pleaded, had been a good and sufficient matter in law to have discharged the said defendant or defendants, against the said information, suit, or action, and the said matters shall be then as available to him or them, to all intent and purposes, as if he or they had sufficiently pleaded, set forth, or alleged the same matter in bar or discharge of such information, suit, or action." This right to plead not guilty by statute is reserved by Rules, 1883, O. xix. r. 12, *ante*, p. 309; by that rule, that defence shall have the same effect as it before had.

O. xxi. r. 19, *ante*, p. 310, requires the defendant, when relying on the

above section, to insert in the margin of the defence the words "By Stat. 21 J. 1, c. 4 (Public Act), s. 4," otherwise such defence will be taken not to have been pleaded by virtue of the statute. See further on this rule, *post*, p. 1142.

This section applies to actions on statutes subsequent, as well as prior, to its being passed. *Spencer, El. v. Swannell*, 3 M. & W. 154; *Jones v. Williams*, 4 M. & W. 375.

To an action for treble damages for pound breach, on 2 W. & M. sess. 1, c. 5, s. 3 (s. 4, Ruff.), the defendant cannot plead "not guilty by statute," for it is not a penal action within 21 J. 1, c. 4. *Castleman v. Hicks*, 2 M. & Rob. 422. See, however, *Jones v. Williams, supra*.

The recovery of a penalty, by an informer, against a person for keeping a house for music and dancing without a licence under the Disorderly Houses Act, 1751, 25 G. 2, c. 36, s. 2, is a bar to a recovery of a second penalty against the same defendant, at the suit of another informer, although the offence is committed on several successive nights. *Garrett v. Messenger*, L. R., 2 C. P. 583. So one penalty only is recoverable against the defendant, for acting or practising as an apothecary without having a certificate, although he attended and supplied medicine to three persons on one day. *Apothecaries Co. v. Jones*, (1893) 1 Q. B. 89.

The effect of bringing an action for a penalty is to make it a debt due to the plaintiff, and judgment obtained in a subsequent action at the suit of another person is no bar to the prior action. *Hutchinson v. Thomas*, 2 Lev. 141; *Girdlestone v. Brighton Aquarium Co.*, 3 Ex. D. 137. A prior action, however, brought by a person in collusion with the defendant, to prevent a recovery at the suit of a *bonâ fide* plaintiff, is no defence, and the fraud may be replied. S. C. As to what amounts to collusion in such a case, *vide* S. C., and S. C. in C. A., 4 Ex. D. 107.

No damages are recoverable in a penal action, except the penalty, *Frederick v. Lookup*, 4 Burr. 2018; *Cuming v. Sibly, Id.* 2489.

ACTIONS FOR WRONGS, INDEPENDENT OF CONTRACT.

ACTION FOR NUISANCE.

UNDER this head are inserted cases, which apply to nuisances in general, as affecting real property.

Where the nuisance is a public one, so as to be an indictable offence, an indictment or information is the proper remedy, and an action will not lie at the suit of a private person; *Ricket v. Metropolitan Ry. Co.*, L. R., 2 H. L. 175; *Winterbottom v. Derby, Ld.*, L. R., 2 Ex. 316; unless he has sustained special damage by such nuisance, beyond that sustained by other persons. *S. C.*; *Iveson v. Moore*, 1 Ld. Raym. 486; *Benjamin v. Storr*, L. R., 9 C. P. 400; and see *McCarthy v. Metrop. Board of Works*, L. R., 7 H. L. 243. See further, *post*, p. 834. The same rules apply to a local authority. *A.-G. v. Logan*, (1891) 2 Q. B. 100; *Tottenham, &c. Council v. Williamson and Sons*, (1896) 2 Q. B. 353, C. A.; *Stoke Parish Council v. Price*, (1899) 2 Ch. 277. As to information by Att.-Gen. to restrain a nuisance, see *A.-G. v. Shrewsbury Bridge Co.*, 21 Ch. D. 752, and cases there cited, *A.-G. v. Logan*, *supra*, and *A.-G. v. Scott*, (1904) 1 K. B. 404, C. A.; (1905) 2 K. B. 160, C. A.

For the reason above mentioned, a private person cannot, of his own authority, abate a public nuisance, *e.g.*, an obstruction to a highway, unless it does him a special injury, and then only so far as is necessary to exercise his right of passing along the highway. *Dimes v. Pettley*, 15 Q. B. 276; 19 L. J., Q. B. 449; *Arnold v. Holbrook*, L. R., 8 Q. B. 96. And where the obstruction arises from nonfeasance, as the decay of a bridge across which the highway passes, he may not re-erect the bridge. *Campbell-Davys v. Lloyd*, (1901) 2 Ch. 518.

The plaintiff may, by a proper defence, be put to prove the inducement, if any; his possessory title; the nuisance; and the damages.

Proof of plaintiff's title.—Injury to reversion.] If the plaintiff is in possession, whether as owner or otherwise, it is sufficient to prove, as usually alleged in the statement of claim, that he was *possessed* of the premises injured by the nuisance. If the nuisance be of a permanent nature, or injurious to the reversion, an action may be brought by the reversioner, as well as by the tenant in possession; each being entitled to recover for his respective loss. *Bedingfield v. Onslow*, 3 Lev. 209; 1 Wms. Saund. 322 *e*, (*k*). The reversioner may sue, where the injury complained of is an injury to his right, though the nuisance is capable of being easily removed; as the obstruction of light, by an alteration in the defendant's house; *Jesser v. Gifford*, 4 Burr. 2141; *Shadwell v. Hutchinson*, M. & M. 350; or by a wall built by the defendant. *Id. v. Id.*, 2 B. & Ad. 97; *Metropolitan Assoc., &c. v. Petch*, 5 C. B., N. S. 287; 27 L. J., C. P. 330; or by injury caused to the plaintiff's house by vibration arising from the working by the defendant on adjoining premises of permanent machinery. *Mew's Brewery Co. v. City of London Electric Lighting Co.*, (1895) 1 Ch. 287, C. A.; *Colwell v. S. Pancras Council*, (1904) 1 Ch. 713. The plaintiff must prove as a fact that he was injured in his reversionary estate. *Kidgill v. Moor*, 9 C. B. 364; 19 L. J., C. P. 177. The action lies by the reversioner against his own tenant, and even although the injury is caused by an act done in breach of an express covenant by the defendant. See *Action for Waste*, *ante*, p. 346. The erection of a roof, which throws rain-water in the yard of the plaintiff's tenant, is a ground of action to the plaintiff, if the jury think the reversion is [or will be] damaged. *Tucker v. Newman*,

11 Ad. & E. 40. But no action lies by the lessor against a stranger, for a mere transient trespass, though it be in assertion of a claim of right of way, &c.; such an act not being injurious to the reversion. *Baxter v. Taylor*, 4 B. & Ad. 72; see, however, the judgment in *Dobson v. Blackmore*, 9 Q. B. 991, where it is observed by the court that, even an act, not permanent, if coupled with an obvious denial of right, as by a public notice, might perhaps be actionable. And it seems that where the plaintiff claims a right of way for his tenants, an obstruction of the exercise of the right, coupled with a denial of it, is actionable, though the obstruction be of a temporary character, as by locking a gate. *Kidgill v. Moor*, ante, p. 759; *Bell v. Midland Ry. Co.*, 10 C. B., N. S. 287; 30 L. J., C. P. 273. But where the act complained of cannot injure the reversion (as in case of a noisy occupant of the next premises), it ought not to be left to the jury; *Mumford v. Oxford, &c. Ry. Co.*, 1 H. & N. 34; 26 L. J., Ex. 265; even although the selling value of the reversion is thereby temporarily diminished. *Rust v. Victoria, &c. Dock Co.*, 36 Ch. D. 113, C. A. Nor is the reversioner in such case entitled to an injunction. *Cooper v. Crabtree*, 20 Ch. D. 589, C. A. A nuisance occasioned by excessive smoke from a neighbour's chimney, is not generally a cause of action for the reversioner. *Simpson v. Savage*, 1 C. B., N. S. 347; 26 L. J., C. P. 50; see also *Mott v. Shoolbred*, L. R., 20 Eq. 22.

In an action for an injury to the reversion, payment of rent to the plaintiff is evidence that he is reversioner. *Logan v. Hall*, 4 C. B. 598; *Daintry v. Brocklehurst*, 3 Exch. 207. In an action by the reversioner, a trustee, proof that the *cestui que trust* let the premises and received rent from the tenant, was held to support an alleged occupation by the tenant, as tenant to the plaintiff. *Vallance v. Savage*, 7 Bing. 595. The plaintiff alleged possession of a wharf, and a nuisance to it by the defendant: plea, not possessed: held, that long user of the wharf would support a verdict for the plaintiff, though the defendant showed a grant to a lessee (under whom the plaintiff claimed) of the use of the land for a certain purpose only. *Page v. Hatchett*, 8 Q. B. 593. Possession of A. B., as tenant to the plaintiff, is proved by showing that A. B. continues legally interested as tenant, though he has given up actual possession to the defendant. *Hosking v. Phillips*, 3 Exch. 168. Where the defendants, corporators, had erected a building on the land of the corporation, which obstructed the market of L.; and L. afterwards demised the market to the plaintiff; an action on the case was held to lie for the plaintiff against the defendants, for continuing the nuisance. *Thompson v. Gibson*, 7 M. & W. 456.

[*Proof of the nuisance.*] To erect anything offensive so near the house of another as to make it useless: as a swine-sty, a forge, &c., is actionable; Com. Dig. Action on the case for Nuisance (A); and it is enough, that it renders the enjoyment of life and property uncomfortable. *Per* Ld. Mansfield, in *R. v. White*, 1 Burr. 337; *Walter v. Selfe*, 4 De G. & Sm. 315, 322, 323; 20 L. J., Ch. 433, 435; *Fleming v. Hislop*, 11 Ap. Ca. 686, 691, 697. It is a nuisance to build a cornice over a neighbour's land; and no proof of damage is necessary. *Fay v. Prentice*, 1 C. B. 828; see also *Battishill v. Reed*, 18 C. B. 696; 25 L. J., C. P. 290. So, to make an artificial heap of earth, which brings damp to the plaintiff's premises, is a nuisance. *Hurdman v. N. Ry. Co.*, 3 C. P. D. 168, C. A. Where, indeed, the plaintiff sued the defendant, for keeping his dogs so near the plaintiff's house, that his family were prevented from sleeping at night, and were much disturbed during the day, and the jury found a verdict for the defendant, though no evidence was given by him; the court refused a new trial; *Street v. Tugwell*, 2 Selw. N. P., 13th ed. 1070; and this has been sometimes represented as an authority, that to keep a kennel close to a neighbour's house is not in law a nuisance. But the court

no doubt would have upheld a verdict the other way, if the jury had found it to be a nuisance; for noise may be a nuisance even in a legal trade. See *Elliotson v. Veetham*, 2 N. C. 134; *Scott v. Firth*, 4 F. & F. 349; *Crump v. Lambert*, L. R., 3 Eq. 409; *Gaunt v. Fynney*, L. R., 8 Ch. 8. And, for this reason, a stable adjoining or near to the plaintiff's dwelling-house has been held to be a nuisance. *Ball v. Ray*, *Id.* 467; *Broder v. Saillard*, 2 Ch. D. 692; *Rapier v. L. Tramways Co.*, (1893) 2 Ch. 588, C. A. So yards for cattle. *Truman v. L. Brighton, &c. Ry. Co.*, 25 Ch. D. 423: reversed in D. P. on the ground that the yards were made under statutory authority. 11 Ap. Ca. 45, *vide post*, p. 773. This case was distinguished in *Rapier v. L. Tramways Co.*, *supra*.

In the case of adjoining houses so built that their several occupiers B. & R. were intended each to enjoy their own property for the ordinary purposes for which they were so constructed, such user by R. is not a legal nuisance as regards B.; if, however, the user by R. is so altered as to cause substantial injury to B., R. is liable. *Ball v. Ray*, L. R., 8 Ch. 467, 469, 470, *per* Ld. Selborne, C. Thus where R. had altered his stables adjoining the house of B., so that their user caused nuisance by noise to B., R. is liable to B. S. C. So in the case of residential flats, where the occupier D. of a lower flat, changed it into a restaurant and fitted up therein a large cooking range, which unduly heated the flue, which passed along the wall of S.'s flat above, thereby creating a nuisance to S., S. can sue D. *Sanders-Clark v. Grosvenor Mansions Co.*, (1900) 2 Ch. 373. In this case it is pointed out that *Reinhardt v. Mentasti*, 42 Ch. D. 685, appears to have been decided on grounds inconsistent with *Ball v. Ray*, *supra*, and this seems to have been the case, notwithstanding the explanation in *A.-G. v. Cole*, (1901) 1 Ch. 205, although the decision itself may perhaps be supported on the facts. As to musical and other sounds in adjoining houses, see *Christie v. Davey*, (1893) 1 Ch. 316, where a distinction was drawn between sounds necessary for carrying on a profession, and such as were made merely to annoy the neighbour.

It is a nuisance to discharge sewage into the sea so as to injure the oysters of the plaintiff stored in ponds or "layings" occupied by him, constructed on the foreshore. *Foster v. Warblington Urban, &c. Council*, (1906) 1 K. B. 648, C. A. So, to discharge rockets, so as to frighten away game on the plaintiff's land adjoining. *Ibbotson v. Peat*, 3 H. & C. 644; 34 L. J., Ex. 118. So without reasonable justification to beset a man's house in order to coerce him in his lawful actions. *J. Lyons & Sons v. Wilkins*, (1899) 1 Ch. 255, *per* Lindley, M.R. and Chitty, L.J. See *Walters v. Green*, (1899) 2 Ch. 696, and *Quinn v. Leatham*, cited *post*, p. 891. "Peaceful picketing," in contemplation or furtherance of a "trade dispute," has however now been legalized by the Trade Disputes Bill, 1906, 6 E. 7, c. 47, s. 2. As to nuisance created by display of fireworks, or by a circus, club or theatre conducing to the collection of a crowd of noisy and disorderly people, in the neighbourhood of the plaintiff's house and blocking up access thereto, see *Walker v. Brewster*, L. R., 5 Eq. 25; *Inehbald v. Robinson*, L. R., 4 Ch. 388, *Bellamy v. Wells*, 60 L. J., Ch. 156, and *Barber v. Penley*, (1893) 2 Ch. 447. As to what amount of obstruction to a highway or navigable river, interfering with the access to the plaintiff's house or wharf, is actionable, *vide* S. C., *Original Hartlepool Collieries Co. v. Gibb*, 5 Ch. D. 713, and *A.-G. v. Brighton, &c. Supply Assoc.*, (1900) 1 Ch. 276, C. A. See further cases cited, *post*, p. 834. The storage of dangerous substances, as wood, naphtha, or gun-powder, in a warehouse in a town, near to streets and dwelling-houses, in such large quantities as to endanger life and property therein, if it chanced to take fire *ab extra*, is a nuisance, although from the care taken no accident has happened. *R. v. Lister, Dears. & Bell*, 209; 26 L. J., M. C. 196. See further cases cited, *post*, p. 791.

The encroachment of the boughs and roots of trees in A.'s land over and within the land of the adjoining owner B. is a nuisance, in respect of which B. may sue A. if damage ensue to B.; *Lemmon v. Webb*, (1894) 3 Ch. 1, 24, *per Kay, L.J.*; as by interfering with the growth of B.'s fruit trees. *Smith v. Giddy*, (1904) 2 K. B. 448. So where A.'s overhanging trees were yews, and B.'s horses were poisoned by eating the yew leaves. *Crowhurst v. Amersham Burial Board*, 4 Ex. D. 5, see also *Firth v. Bowling Iron Co.*, 3 C. P. D. 254. But A. is not liable if the yews do not extend beyond A.'s land, and B.'s horses trespass thereon so as to get to the yews, A. not being under an obligation to fence against B.'s cattle. *Ponting v. Noakes*, (1894) 2 Q. B. 281. See also *Wilson v. Newberry*, L. R., 7 Q. B. 31. A person is not liable for injury caused by that which grows naturally on his land, *e.g.*, thistles, the seed of which is scattered by the wind on the land around. *Giles v. Walker*, 24 Q. B. D. 656.

As to what nuisance is of so permanent a nature as to give a reversioner a right of action, *vide ante*, pp. 759, 760.

A public nuisance is a ground of action if a special injury also be alleged and shown by the plaintiff, beyond that which is common to the public at large: *vide ante*, p. 759. In such cases the private injury or damage, as a ground of action, appears on the record. Where vitriol works were established by the defendant, which were complained of as injurious to the plaintiff's garden, evidence was admitted on both sides to show the effect of the works on other gardens in the same neighbourhood; but the plaintiff's counsel was not allowed to ask one of the defendant's witnesses, "whether he knew of any money paid by the defendant to another person A. for alleged damage to his ground by the works;" although he had stated, on his examination, that he knew of no damage to A. by them; for the inquiry as to such payment is collateral, and the answer would not be evidence, either to prove damage, or to test the veracity of the witness. *Tennant v. Hamilton*, 7 Cl. & F. 122. Whether an act done is a nuisance or not, depends not only on the act itself, but on the surrounding circumstances, for what would be a nuisance in one place would not be in another. *Sturges v. Bridgman*, 11 Ch. D. 852, C. A.; *Rushmer v. Polsue, &c.*, (1906) 1 Ch. 234, C. A.; (1907) A. C. 121, D. P.; but a substantial addition to noise previously existing may be actionable as a nuisance. S. C.

In the case of *Walter v. Selfe*, *ante*, p. 760, Bruce, V.-C., granted an injunction against the continuance of a brick-clamp near the plaintiff's house, although it was shown that other brick-clamps had been burning in the same neighbourhood. Where any act is shown to interfere with the comfort of an individual, so as to come within the legal definition of a nuisance, it cannot be justified by the finding of a jury that it is done in a proper and convenient place, and is a reasonable use by the defendant of his land and premises. *Bamford v. Turnley*, 3 B. & S. 62; 31 L. J., Q. B. 286, Ex. Ch., over-ruling *Hole v. Barlow*, 4 C. B., N. S. 334; 27 L. J., C. P. 207. Thus, where the plaintiff and the defendant had purchased adjoining portions of some land, sold for building purposes; the defendant in order to obtain bricks to build upon his own land, erected a temporary clamp of bricks within 180 yards of the plaintiff's house, but on that part of his land which was most distant from the plaintiff's house; the action was held to lie. *Bamford v. Turnley*, *supra*. The question for the jury is, whether burning the bricks rendered the enjoyment of the plaintiff's life and property substantially uncomfortable, and not whether the bricks were burnt in a convenient place. *Cavey v. Lidbetter*, 13 C. B., N. S. 470; 32 L. J., C. P. 104; *A.-G. v. Cole*, (1901) 1 Ch. 205. In the case of *Wanstead Local Board v. Hill*, 13 C. B., N. S. 479; 32 L. J., M. C. 135, Willes, J., is reported to have said that the case of *Bamford v. Turnley*, *supra*, over-rules *Hole v. Barlow*, *supra*, in this respect only, that it decides that it is not in every case to be left to the jury to say whether the

act complained of was, under the circumstances, done in a reasonable place, and was a reasonable use of the land of the person who did it. As to nuisance created by erection of a new kiln near plaintiff's land, see *Boreham v. Hall*, W. N. 1870, p. 57, H. T., Stuart, V.-C.

There is a difference between a nuisance which produces material injury to the property, and one which is productive merely of sensible personal discomfort; persons must sometimes submit to the latter, in order that their neighbours may carry on their trades, whereas, if the nuisance caused sensible injury to the value of adjacent property, it would be actionable. *Tipping v. S. Helen's Smelting Co.*, 11 H. L. C. 642; 35 L. J., Q. B. 66. In this case, the vapours from the defendant's smelting furnaces, destroyed the shrubs on the plaintiff's grounds adjacent, and it was held that the action was maintainable on the above principle. See further, *Salvin v. N. Brancepath Coal Co.*, L. R., 9 Ch. 705; *Shotts Iron Co. v. Inglis*, 7 Ap. Ca. 518, D. P. It is not sufficient that the vapours, &c., should do harm to some particular trade in the neighbourhood, if they would not prejudicially affect any ordinary trade, or the ordinary enjoyment of life. *Robinson v. Kilvert*, 41 Ch. D. 88, C. A. If smoke and noise materially interfere with the comfort of human existence, in the plaintiff's premises, it is an actionable nuisance. *Crump v. Lambert*, L. R., 3 Eq. 409. See also *Scott v. Firth*, 4 F. & F. 349, and *Walter v. Selfe*, *ante*, p. 762. It is a nuisance to use a traction-engine on a highway so as to make it foundrous and a cause of danger; *A.-G. v. Scott*, (1901) 1 K. B. 401, C. A.; provided the road authority have kept the road up to the proper standard for the traffic that may reasonably be expected to traverse it, but not otherwise. S. C., (1905) 2 K. B. 160, C. A. See also *Chichester Cor. v. Foster*, (1906) 1 K. B. 167, where the defendant's traction-engine broke the plaintiff's water main under the road. But for such things as merely abridge the pleasure of the plaintiff in the enjoyment of his property, as shutting out the prospect from his windows, an action will not lie. *Aldred's case*, 9 Rep. 58 b. And an occupier is entitled to use his premises in a reasonable manner, although the user may cause some inconvenience to the occupier of neighbouring premises. *Gaunt v. Fynney*, L. R. 8 Ch. 8; *Christie v. Davey*, and other cases cited, *ante*, p. 761. As to when a *quia timet* action will lie, *vide post*, p. 772.

If, after a highway has been established, anything be newly made so near to it as to be dangerous to those using the highway, this will be unlawful and a nuisance. Thus, where the defendant's house and area, which were newly erected and incomplete, adjoined a public footway, and the plaintiff was injured by falling into the area, while passing along the way, with ordinary care in the night; held that the defendant was liable, and that it was immaterial that the party injured had fallen in consequence of his accidentally deviating from the path, and so inadvertently becoming a trespasser. *Barnes v. Ward*, 9 C. B. 392; 19 L. J., C. P. 195; *Hadley v. Taylor*, L. R., 1 C. P. 53. If, indeed, the area had been distant from the path, so as not to be dangerous to passengers using it, there would have been no liability. *Barnes v. Ward*, *supra*, and the cases there cited; *Coupland v. Hardingham*, 3 Camp. 398; *Jarvis v. Dean*, 3 Bing. 147. In *Harcastle v. S. Yorkshire, &c., Ry. Co.*, 4 H. & N. 67; 28 L. J., Ex. 139, where a foot-passenger missed his way along a public path, and strayed into a reservoir made by the defendants near to, but not "substantially adjoining," the path, the defendants were held not liable, though the jury found the reservoir dangerous, and that the foot-passenger had used ordinary care. *Accord. Hounsell v. Smyth*, 7 C. B., N. S. 731; 29 L. J., C. P. 203; and *Binks v. S. Yorkshire, &c., Ry. Co.*, 3 B. & S. 241; 32 L. J., Q. B. 26. The defendant's duty is to guard only against such accidents as may reasonably be foreseen. *Pearson v. Cox*, 2 C. P. D. 369, C. A. Where A. lawfully diverts a public footpath, he must take steps to protect reasonably careful persons from injury by going astray

at the point of diversion. *Hurst v. Taylor*, 14 Q. B. D. 918. In *Williams v. Groucott*, 3 B. & S. 149; 32 L. J., Q. B. 237, the occupier of mines was held liable to an action, at the suit of the occupier of the soil above, for leaving a shaft insufficiently covered, so that a horse fell in and was injured. As to the duty of fencing in the case of abandoned mines, see stat. 50 & 51 V. c. 58, s. 37. And a person, who affixes to his house a lamp, which projects over a public footway, or who allows it to remain so fixed, is liable for any injury which may be caused to a passer-by by reason of its non-repair. *Tarry v. Ashton*, 1 Q. B. D. 314.

But a way may be dedicated to the public, subject to the inconvenience or risk arising from its peculiar condition. In *Fisher v. Prowse*, 2 B. & S. 771; 28 L. J., Q. B. 212, the defendant was occupier of a house adjoining the public street; the mouth of the cellar opened into the street by a trap-door, which was closed at night by a flap, which slightly projected over the footway; the plaintiff fell over the flap, which, as far back as memory went, had been in the same condition; held, that there was no evidence to go to the jury. The principle of this case was followed in *Robbins v. Jones*, 15 C. B., N. S. 221; 33 L. J., C. P. 1; and *Mercer v. Woodgate and Arnold v. Blaker*, cited *post*, p. 834. So persons may be allowed to go across dangerous land, at their own peril; in which case the owner is not, in the absence of anything in the nature of a trap, liable for any injury that may happen to the licensees from such use of the land. *Hounsell v. Smyth*, *supra*; *Bolch v. Smith*, *post*, p. 764; *Gautret v. Egerton*, L. R., 2 C. P. 371; *Castle v. Parker*, 18 L. T. 364; E. T. 1868, Ex. See also *Ivay v. Hedges*, 9 Q. B. D. 90. Where one of the workmen of a contractor, employed in a dockyard, was hurt by unfenced machinery whilst crossing the yard, which for his own convenience he was allowed to do, this was held to give no right of action, as he was a mere licensee, who had only the right not to be treated as a trespasser, and the danger was open and visible. *Bolch v. Smith*, 7 H. & N. 736; 31 L. J., Ex. 201. The court, in this case, intimated that the decision would have been otherwise, if the danger had been in the nature of a trap, as explained in *Corby v. Hill*, *infra*. See *Smith v. L. & S. Katherine's Docks Co.*, L. R., 3 C. P. 326, *post*, p. 799. In *Seymour v. Maddox*, 16 Q. B. 326; 20 L. J., Q. B. 327, the owner of a theatre was held not liable for an injury sustained by one of the players, who fell through an aperture in the floor of the stage, which was not sufficiently lighted. In *Southcote v. Stanley*, 1 H. & N. 247; 25 L. J., Ex., 339, the declaration stated that the plaintiff, a visitor at the defendant's house, had been injured by the falling of a glass door through the negligence of the defendant; it was held that the plaintiff having *pro hac vice* become an inmate of the defendant's family, a rule similar to that in the case of fellow-servants (*post*, p. 801) applied, and the action would not lie, as the negligence might have been that of the defendant's servant. See also *Collis v. Selden*, L. R., 3 C. P. 495. Where the plaintiff, a carman, who went to fetch some goods from the defendant's house, was directed by the defendant's servant to go to the counting-house; in going along a dark passage in the direction indicated, the plaintiff fell down a staircase and was injured; it was held that the defendant was not liable, on the ground that either the plaintiff could see, and therefore the accident arose from his own negligence, or if he could not see he ought not to have proceeded without a light. *Wilkinson v. Fairrie*, 1 H. & C. 633; 32 L. J., Ex. 73.

Where the obstruction is lawful, it may give rise to an action upon proof that it was concealed, and the plaintiff invited to pass near it. In *Corby v. Hill*, 4 C. B., N. S. 556; 27 L. J., C. P. 318, permission was given to the defendant to place a stack of slates on a private road, with the consent of the owners and occupiers of the road; the slates were left at night with no

light to mark the spot where they were, and the plaintiff (while using the road) drove over them and was injured; held that the defendant was liable. So, where the owner of lands permits others to pass over it, he is liable for an accident caused by the negligence of himself or his servants to the plaintiff, a person lawfully availing himself of such permission, for of such negligence the plaintiff could not be aware; but he is not liable for an accident caused by the ordinary risks attaching to the nature of the place or the business carried on. *Gallagher v. Humphrey*, 10 W. R. 664, T. T. 1862, Q. B. In *Chapman v. Rothwell*, E. B. & E. 168; 27 L. J., Q. B. 315, the plaintiff's wife was returning as a customer from the defendant's brewery through the regular passage, when she fell through a trap-door improperly guarded and lighted; held that the defendant was liable. *Accord. Shoebottom v. Egerton*, 18 L. T. 364, 889, H. T. 1868. So, where a gas-fitter sent his servant, the plaintiff, to fix some gas apparatus in the defendant's sugar refinery, at his request, and the plaintiff fell through an unfenced shaft in the floor of the refinery and was injured, it was held that the defendant was liable. *Indermaur v. Dames*, L. R., 1 C. P. 274; L. R., 2 C. P. 311, Ex. Ch. In this case the plaintiff was on the premises, in the capacity of "a person on lawful business, in the course of fulfilling a contract, in which both the plaintiff and defendant had an interest, and not upon bare permission," and with respect to such a visitor at least, it is "settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that where there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact." S. C., L. R., 1 C. P. 285, 288; L. R., 2 C. P. 313. So the owner, M., of a building let in flats, the staircase remaining under his control, is liable to the plaintiff who, after calling in the course of business on one of M.'s tenants on an upper flat, fell while descending the staircase, through its worn and defective condition, and was thereby injured. *Miller v. Hancock*, (1893) 2 Q. B. 177, C. A. See also *White v. France*, 2 C. P. D. 308, and cases cited *post*, pp. 791-2, 796-7; *Heaven v. Pender*, 11 Q. B. D. 503, C. A., and *Smith v. L. & S. Katherine's Dock Co.* L. R., 3 C. P. 326, *post*, p. 799. A person is guilty of a public nuisance if he place anything on his own land, near a highway, which is dangerous from causing horses passing along there to shy. *Brown v. Eastern & Midland Ry. Co.*, 22 Q. B. D. 391, C. A. In an action for damages caused thereby, evidence that other horses than those of the plaintiff have shied thereat, is admissible to prove that it is such nuisance. S. C. As to injury caused by a defective fence of the defendants along a highway, see *Harrold v. Watney*, *post*, p. 781. Where a statute empowered a local board to erect a landing stage in a navigable river, the board were held liable to the owner of a ship which was injured on anchors laid down by them in the river for the above purpose; for by reason of the anchors being insufficiently marked with buoys, they formed a concealed danger. *Jolliffe v. Wallasey Local Board*, L. R., 9 C. P. 62. See also *R. v. Williams*, 9 Ap. Ca. 418, J. C. The owner of a market is bound, as against a person paying him toll for its use, to keep the market-place in a safe condition. *Lux v. Cor. of Darlington*, 5 Ex. D. 28, C. A.

The nuisance occasioned by the defendant.] This action may be brought either against the person who originally occasioned the nuisance, or against his alienee who permits it to be continued; but a request to the alienee to remove or abate the nuisance must be proved. *Penruddock's case*, 5 Rep. 101 a. See further *post*, p. 772. Where a notice to remove the nuisance

had been served upon the predecessor of the defendant, Abbott, C.J., ruled that, being delivered on the premises to the occupier for the time being, it bound a subsequent occupier. *Salmon v. Bensley*, Ry. & M. 189. Where the defendants occupied one floor of an unfinished warehouse, by permission of the owner, and the plaintiff fell through an unfenced hoist hole adjoining the public way, and used by the defendants, it was held that the defendants were bound to fence the hoist hole, and were liable for injury occasioned by their neglecting to do so. *Hadley v. Taylor*, L. R., 1 C. P. 53. So where the carmen of the defendant, for the purpose of delivering coals, removed the plate in the footway and left it unfenced; held, that defendant was liable to a person injured in consequence. *Whitely v. Pepper*, 2 Q. B. D. 276. Where a railway company, under their acts, construct their line across a highway on a level, they must keep the crossing in a proper state for carriages to cross the rails, or they will be liable for injury done to a passing carriage. *Oliver v. N. E. Ry. Co.*, L. R., 9 Q. B. 409. A contractor lawfully employed to construct a sewer under a road, is not liable for injury caused to an individual through a hole having formed in the road by the natural subsidence of the ground, the work having been properly completed by the defendant. *Hyams v. Webster*, L. R., 2 Q. B. 264; L. R., 4 Q. B. 138, Ex. Ch.; see also *Bartlett v. Baker*, 3 H. & C. 153; 34 L. J., Ex. 8. The defendant is liable for any obstruction to a highway which he is bound to remove, e.g., where his bank and retaining wall fall over the highway. See *Gully v. Smith*, 12 Q. B. D. 120. As to the liability of the defendant for obstruction to the highway caused by crowds which his acts have drawn together, *vide ante*, p. 761.

It is now well established, that where a contractor, employed to do a lawful act, causes a nuisance in the course of his work, the contractor alone, and not the employer, is responsible, and the principle of *Bush v. Steinman*, 1 B. & P. 404, if it be understood to mean that the occupier of fixed property must take care so to use and manage it as not to injure others, whether by his own servants or by other persons whom he brings on the premises, has not of late years been followed. See the judgment of Littledale, J., in *Laugher v. Pointer*, 5 B. & C. 547, and *Quarman v. Burnett*, 6 M. & W. 499, which cases are cited *post*, p. 776. In *Reedie v. L. & N. W. Ry. Co.*, 4 Exch. 244, where the defendants employed a contractor to build a bridge, whose workmen were so negligent as to cause a stone to fall upon the plaintiff, it was held that the defendants were not liable, although they had reserved a power to dismiss incompetent workmen. In such cases the action lies only against the person who, by himself or his servant, committed the injury; and a subcontractor, or other person, exercising an independent employment, is not a servant within the meaning of the rule, so as to render his employer liable. *Rapson v. Cubitt*, 9 M. & W. 710; *Milligan v. Wedge*, 12 Ad. & E. 737; *Allen v. Hayward*, 7 Q. B. 960, 975. The rule is, "that you must look to the wrongdoer himself, or to the first person in the ascending line, who is the employer and has control over the work; you cannot go further back, and make the employer of that person liable." *Murray v. Currie*, L. R., 6 C. P. 24, 27, *per* Willes, J. Thus, where a contractor, employed by navigation commissioners, in the course of executing the works, flooded the plaintiff's land, by improperly, and without authority, introducing water into a drain *insufficiently made by himself*, the contractor, and not the commissioners, was held liable. *Allen v. Hayward*, *supra*. So, where a person employed a contractor to build on his land, and the workmen excavated the ground so negligently as to cause injury to the next house, the contractor, and not the person who employed him, was held liable. *Gayford v. Nicholls*, 9 Exch. 702; 23 L. J., Ex. 205. In this case the plaintiff had no right of support for his house, and the case is thus distinguishable from *Angus v. Dalton*, and

other cases cited *post*, p. 813. Where a company contracted with A. to construct a railway, and A. subcontracted with B. to construct a bridge on it, and B. employed C. to erect the scaffold, under a special contract between him and C., a passenger, injured by the negligent construction of the scaffold, must sue C. and not B. *Knight v. Fox*, 5 Exch. 721. On the same principle the subsequent cases of *Overton v. Freeman*, 11 C. B. 867; 21 L. J., C. P. 52, and *Cuthbertson v. Parsons*, 12 C. B. 304; 21 L. J., C. P. 165, and *Murphy v. Carulli*, 3 H. & C. 462; 34 L. J., Ex. 1-1, *post*, p. 799, were decided. See also *Glover v. E. London W. Works Co.*, 17 L. T. 475, H. T. 1868, C. P., and *Pearson v. Cox*, 2 C. P. D. 369, C. A. And the nature of the work may be such as to raise a presumption in accordance with ordinary experience, that an independent contractor would be employed to do the work, *e.g.*, to repair the roof of a house in a large town; in such case the onus of showing that the person who created the nuisance was the servant of the defendant, and not an independent contractor, is thrown on the plaintiff. *Welfare v. L. Brighton & S. C. Ry. Co.*, L. R., 4 Q. B. 693.

But, where the employer retains his control over the contractor, and personally interferes, and makes himself a party to the act that has occasioned the damage, he becomes liable. Thus, where defendant employed a contractor, A., to make a drain, and A.'s men left some of the rubbish in the highway, whereby an accident happened, and it further appeared that the defendant, on complaint made, had promised to remove the rubbish, and had paid for carting part of it away, and it did *not* appear that the contractor had undertaken to remove it; held, that there was evidence to fix the defendant. *Burgess v. Gray*, 1 C. B. 578; see also *Wiggett v. Fox*, and other cases mentioned *post*, p. 803.

And where the nuisance directly results from the thing contracted to be done, the employer is liable. The defendants, a company without special powers for that purpose, directed W. to open trenches in the streets of Sheffield, and the servants of W., whilst engaged in the task, left a heap of stones on the footway, over which the plaintiff fell, the defendant was held to be liable, as what he had ordered to be done was a public nuisance. *Ellis v. Sheffield Gas Consumers' Co.*, 2 E. & B. 767; 23 L. J., Q. B. 42. So where the defendant has brought another person on the land in his occupation, and allowed him to commit a nuisance thereon, the defendant is liable.

White v. Jameson, L. R., 18 Eq. 303. See *Jenkins v. Jackson*, 40 Ch. D. 71, and further cases cited *infra*, and *post*, p. 768. And where a person causes "something to be done, the doing of which casts on him a duty, he cannot escape from the responsibility attaching to him of seeing that duty performed by delegating it to a contractor." *Angus v. Dalton*, 6 Ap. Ca. 740, 829; *Bower v. Peate*, 1 Q. B. D. 321; *Percival v. Hughes*, 9 Q. B. D. 441, C. A.; 8 Ap. Ca. 443, D. P. Thus, where a person orders work to be done on his land which, though lawful in itself, would, in the natural course of things, cause injury to his neighbour, unless special precautions are taken, *e.g.*, causing interference with the right of support of adjacent buildings, he is bound to have reasonable skill used that proper precautions should be taken in order to prevent the mischief; S.C.C.; see also *Black v. Christchurch Finance Co.*, (1894) A. C. 48, J. C. In these cases the duty was imposed on the defendants by common law. The same principle applies when it arises under a statute. *Hole v. Sittingbourne Ry. Co.*, 6 H. & N. 488; 30 L. J., Ex. 81. The defendants, being authorized by statute to make an opening bridge over a navigable river, employed a contractor to construct it: held, that they were liable for damage caused by the defect of the bridge. S. C.; see *Glover v. E. London Waterworks Co.*, *ante*, p. 767. So where dangerous work is done by statutory authority on a highway. *Holliday v. National Telephone Co.*, (1899) 2 Q. B. 392, C. A. Where P. had employed H. to

carry a drain across the footway of the public road, in accordance with the Metropolis Local Management Act, and the soil was so carelessly replaced that it subsided, leaving a trench into which the plaintiff fell and was injured, it was held that P. was liable. *Gray v. Pullen*, 5 B. & S. 970; 34 L. J., Q. B. 265, Ex. Ch. *Accord. Hardaker v. Idle District Council*, (1896) 1 Q. B. 335, C. A., and *Penny v. Wimbledon, &c., Council*, (1899) 2 Q. B. 72, C. A. But P. is not liable when the injury is caused by negligence merely casual or collateral to the work directed to be done. *Id.* 76, 78. And where P., in pursuance of a statutory power, delegates the performance of a duty to another, his liability ceases. *Allred v. W. Metropolitan Trans Co.*, (1891) 2 Q. B. 398, C. A. As where the duty of repairing the highway has, by a contract made under 33 & 34 V. c. 78, s. 29, been transferred from the trainway company to the road authority R. S. C. In this case R. is liable for injury caused by non-repair. *Barnett v. Poplar Cor.*, (1901) 2 K. B. 319.

Although the owner of land, after letting it, is not liable for a nuisance, erected by the tenant, yet if he let or re-let the land with a nuisance upon it, or retain control over the repairs, he is liable, notwithstanding the tenancy. Where damage arose from the non-repair of a trap-door over a cellar, the lessor was held to be rightly sued, it being proved that, as between him and the lessee, it was the duty of the lessor to repair; *Payne v. Rogers*, 2 H. Bl. 349; but, unless this were proved, the landlord would not be liable. *Cheetham v. Hampson*, 4 T. R. 318; *Russell v. Shenton*, 3 Q. B. 449. In *Rosewell v. Prior*, 2 Salk. 460, the lessor was held liable for the continuance upon land, which he had leased, of a wall which obstructed the plaintiff's lights, because the wall existed at the time of the demise. In *Rich v. Basterfield*, 4 C. B. 783, in an action against the owner of premises for a nuisance, arising from smoke issuing out of a chimney which he had erected, the court decided in favour of the defendant, as the chimney was not in itself a nuisance, but only the user of it in such a way as to cause smoke to issue. This case was explained in *Harris v. James*, 45 L. J., Q. B. 545, 546, where it was held that if A. let his land to B. to be used for works which, if carried on in the usual way, will be a nuisance to C., A. is liable for the nuisance created by such user by B. *Accord. Baker v. Gt. N. Ry. Co.*, Mar. 18th, 1884, Q. B. D. *ex rel. amici*. In *Todd v. Flight*, 9 C. B., N. S. 377; 30 L. J., C. P. 21, the owner of a stack of chimneys, having demised them while in a ruinous condition, and kept and maintained them, in that state, was held liable to an action at the suit of a person upon whose house they fell. In *Gandy v. Jubber*, 5 B. & S. 78; 43 L. J., Q. B. 151, where an area grating had fallen into a dangerous condition, during a yearly tenancy, the reversioner was made responsible for damage caused by it, as he might have determined the tenancy before the mischief had happened; but error, and an appeal were brought in this case, and the plaintiff, at the suggestion of the Court of Ex. Ch., consented to a *stet processus*, all the judges intimating that the decision of the Court below was wrong. 5 B. & S. 485. See the undelivered judgment, 9 B. & S. 15, n. See also L. R., 4 C. P. 200. *Accord. Pretty v. Bickmore*, L. R., 8 C. P. 401; followed in *Gwinnell v. Eamer*, L. R., 10 C. P. 658. And it is now settled that the owner is only liable for an injury caused to a stranger by the defective repair of premises let by him, when he contracted with the occupier to do the repairs, or when he commits a misfeasance, as by letting the premises in a ruinous or dangerous condition. *Nelson v. Liverpool Brewery Co.*, 2 C. P. D. 311; *Bowen v. Anderson*, (1894) 1 Q. B. 164. This principle extends to a weekly tenancy. S. C. And if a house be let when in a dangerous condition, the landlord C. is not liable for injury caused to the tenant T. or to a person using the house, by reason of such condition, where, at any rate, C. had not contracted with T. to repair. *Lane v. Cox*, (1897) 1 Q. B. 415, C. A.; nor

even if C. had so contracted would he be liable, except to T. under the contract. *Cavalier v. Pope*, (1905) 2 K. B. 757, C. A.; (1906) A. C. 428, D. P. See also *Malone v. Laskey*, (1907) 2 K. B. 141, C. A. As to the liability of a defendant for a nuisance erected by a stranger on the defendant's land, see *Saxby v. Manchester & Sheffield Ry. Co.*, L. R., 4 C. P. 198, cited *post*, p. 841.

The acts of two or more persons may, taken together, be a nuisance for which each is liable, though it would be otherwise if taken separately. *Lambton v. Mellish*, (1894) 3 Ch. 163, following *Thorpe v. Brumfitt*, *post*, p. 834.

Trustees or commissioners, acting for public purposes, without salary or reward, are as responsible as private individuals. *Mersey Docks Board v. Gibbs*, and *Id. v. Penhallow*, L. R., 1 H. L. 93; *Coe v. Wise*, L. R., 1 Q. B. 711, Ex. Ch., overruling the cases to the contrary. See also *Collins v. Middle Level Commissioners*, L. R., 4 C. P. 279; *Winch v. Thames Conservators*, L. R., 7 C. P. 458; L. R., 9 C. P. 378, Ex. Ch. The liability of a body created by statute is governed by that statute; for mere nonfeasance it is not liable, except in respect of a duty to the plaintiff imposed by the statute and neglected. *Gibraltar Sanitary Comrs. v. Orfila*, 15 Ap. Ca. 400, J. C. Such body is not liable as a stranger and apart from such duty. *Stretton's Brewery Co. v. Mayor of Derby*, (1894) 1 Ch. 431. And where the statutory power given has not been exceeded, the body is not liable for injury. *E. Freemantle Cor. v. Annois*, (1902) A. C. 213, J. C. In the *Mersey Docks Cases*, *supra*, it was held that the trustees of docks, receiving tolls from vessels which used them, were liable for damage caused by their keeping a dock open, when they knew, or had the means of knowing, of its dangerous condition, even though the tolls were devoted simply to the maintenance of the docks, and the reduction of tolls. *Accord. The Bearn*, (1906) P. 48, C. A. See also *R. v. Williams*, 9 Ap. Ca. 418, J. C. So the Trinity House are liable for damage done by a buoy negligently kept by them in a dangerous state. *Gilbert v. Trinity House*, 17 Q. B. D. 795.

So, even formerly, such trustees were held liable where their acts were of an arbitrary and oppressive character. *Leader v. Moxton*, 3 Wils. 461; *Boulton v. Crowther*, 2 B. & C. 703. So also, where an injury arises from the neglect or careless discharge, by the trustees, of the duties personally imposed upon them; *Ruck v. Williams*, 3 H. & N. 308; 27 L. J., Ex. 357; *Whitchouse v. Fellowes*, 10 C. B., N. S. 765; 30 L. J., C. P. 305; *Ohrby v. Ryde Commissioners*, 5 B. & S. 743; 33 L. J., Q. B. 296; or where they have personally interfered in the carrying out of works authorized by the legislature. *Southampton, &c. Bridge Co. v. Southampton Local Board*, 8 E. & B. 801; 28 L. J., Q. B. 41. So, where the works which they were authorized to construct were for trading and other profitable purposes; *Scott v. Manchester, Mayor, &c. of*, 2 H. & N. 204; 26 L. J., Ex. 406; or where the act, in the execution of which those whom they employed were guilty of negligence, was itself unauthorized by the special act. *Brownlow v. Metropolitan Board of Works*, 13 C. B., N. S. 768; 33 L. J., C. P. 233, Ex. Ch. But where the injury to the plaintiff arose from long detention in a canal, by reason of a fall of a lock from want of repair, the commissioners not being liable to repair, but having power to enforce repair by others, it was held that the commissioners were not liable, the cause of damage being too remote. *Walker v. Gee*, 4 H. & N. 350; 28 L. J., Ex. 184; and this decision would seem not to be affected by the *Mersey Dock Cases*, *ante*, p. 769. See also *Forbes v. Lee Conservancy Board*, 4 Ex. D. 116, and cases cited *post*, pp. 772, 773. As to the non-liability of a trade union for the acts of its agents, see the Trade Disputes Act, 1907, 6 E. 7, c. 47, ss. 1, 4 (1), *post*, p. 892; s. 2, *ante*, p. 761; and s. 3, *post*, p. 940.

No action is maintainable against the inhabitants of the county, or of a parish, for the non-repair of a county bridge, or of a highway, which they are respectively bound to repair. *Russell v. Men of Devon*, 2 T. R. 667. Nor does the action lie against a county surveyor appointed under 43 G. 3, c. 59; *McKinnon v. Penson*, 9 Exch. 609; 23 L. J., M. C. 97, Ex. Ch.; nor against the surveyor of highways appointed under 5 & 6 W. 4, c. 50. *Young v. Davis*, 7 H. & N. 760; 31 L. J., Ex. 250; Ex. Ch., 2 H. & C. 197; even for the negligence of sub-contractors employed by him by order of the vestry. *Taylor v. Greenhalgh*, L. R., 9 Q. B. 487; but see *Pendlebury v. Greenhalgh*, *infra*. Nor does the action lie against a local board of health, constituted under the Public Health Act, 1875, 38 & 39 V. c. 55; *Cowley v. Newmarket Local Board*, (1892) A. C. 345, D. P., approving; *Gibson v. Preston Cor.*, L. R., 5 Q. B. 218; decided under 11 & 12 V. c. 63; nor against a metropolitan vestry under 18 & 19 V. c. 120; *Parsons v. S. Matthew's Vestry*, L. R., 3 C. P. 56; for these bodies are placed by those statutes in the position of the surveyors of highways, and are not liable for *nonfeasance*. And this is the rule where the obligation to repair is transferred by statute to a public corporation, unless the statute shows that the liability is to be imposed thereon. *Pictou Municipality v. Geldart*, (1893) A. C. 524, J. C.; *Sydney Municipal Council v. Bourke*, (1895) A. C. 433, J. C.; *Maguire v. Liverpool Cor.*, (1905) 1 K. B. 767, C. A. The decision in *Hartnall v. Ryde Commrs.*, 4 B. & S. 361, 33 L. J., Q. B. 39 is overruled so far as it is contrary to this principle. S. C. See however *Shoreditch Borough v. Bull*, *infra*.

Local boards of health are, however, liable for *misfeasance*, and may be sued for the *negligent acts* of their servants, as in leaving a heap of stones by the side of the road without a light at night. *Foreman v. Canterbury Cor.*, L. R., 6 Q. B. 214. So, as the owners of a sewer, for not keeping a grid thereof in repair. *White v. Hindley Local Board*, L. R., 10 Q. B. 219; *accord*. *Blackmore v. Mile End Old Town Vestry*, 9 Q. B. D. 451, C. A. See also *Bathurst Borough v. Macpherson*, 1 Ap. Ca. 256, J. C., and observations thereon in *Sydney Municipal Council v. Bourke*, *supra*. Where a corporation S. which is both sewer and highway authority breaks up a road, and before it has been restored to its normal state, an accident happens in the course of events which but for that alteration would not have happened, S. is liable for *misfeasance*. *Shoreditch Borough v. Bull*, 2 L. G. R. 756, Feb. 16, 1904, D. P. And *quere* whether in several previous cases acts of *misfeasance* were not erroneously described as acts of *non-feasance* merely? *Id.* 760, *per* Ld. Halsbury, C. So where a rural district council, B., which was the highway authority, removed a fence put up by its predecessors along the side of the highway, so that it thereby became dangerous during floods, and occasioned an accident. *Whyler v. Bingham, &c., Council*, (1901) 1 K. B. 45, C. A. And the surveyor of highways is liable for injury caused by his personal negligence. *Pendlebury v. Greenhalgh*, 1 Q. B. D. 36, C. A. A water company who, under statutory power, places plugs in a highway, is not liable for injury caused by the projection of the plugs owing to the wearing away of the road. *Moore v. Lambeth Waterworks Co.*, 17 Q. B. D. 462, C. A. So where a corporation, B., is both water authority and road authority, B. is not in such a case liable. *Thompson v. Brighton Cor.*; and *Oliver v. Horsham Local Board*, (1894) 1 Q. B. 332, C. A.

As to the non-liability of the head of a Government Department for wrongful acts of his subordinates, see *Bainbridge v. Postmaster-Gen.* cited *ante*, p. 651.

In determining whether the non-performance of a statutory duty, which causes injury to A., gives A. a right of action, much depends "on the purview of the Legislature in the particular statute and the language which they there employed." *Cowley v. Newmarket Local Board*, (1892) A. C. 352,

per *Ld. Herschell*, citing *Atkinson v. Newcastle Waterworks Co.*, 2 Ex. D. 441, 448, C. A., and *Glossop v. Heston, &c., Local Board*, 12 Ch. D. 102, 109, and doubting *Couch v. Steel*, 3 E. & B. 402, 23 L. J., Q. B. 121. *Accord. Johnston, &c. v. Consumers Gas Co. of Toronto*, (1898) A. C. 447, 454, J. C. See also *Pictou Municipality v. Geldart*, and *Sydney, Municipal Council of v. Bourke*, *ante*, p. 770. Thus a London district board was not liable for special damage caused by its neglect to remove snow from the streets as required by 54 & 55 V. c. 76, s. 29, under a penalty. *Saunders v. Holborn District Board*, (1895) 1 Q. B. 64. But a district council is liable for nuisance caused to a landowner from its failing to cleanse a sewer vested in it, as required by the Public Health Act, 1875, s. 19. *Baron v. Portslade District Council*, (1900) 2 Q. B. 588, C. A. And a tramway company is liable for damage caused by its neglect to keep the roadway between the rails, &c., in good condition and repair to the satisfaction of the road authority, as required by the Tramways Act, 1870, 33 & 34 V. c. 78, s. 28. *Dublin United Tramways Co. v. Fitzgerald*, (1903) A. C. 99, D. P.

The injury must be the natural or ordinary consequence of the defendant's wrongful act. *Sharp v. Powell*, L. R., 7 C. P. 253. Where the defendants, a water company, caused a spout of water to shoot up on a public highway, and thereby frightened the plaintiff's horses, so that they swerved, and fell into a ditch insufficiently fenced, made in the middle of the road by the commissioners of sewers, and were injured, it was held that the defendants were liable; the spout of water being the *causa causans* of the injury. *Hill v. New River Co.*, 9 B. & S. 303. See also *Harris v. Mobbs*, 3 Ex. D. 268; *Wilkins v. Day*, 12 Q. B. D. 110. The cases of *Burrows v. March Gas Co.*, L. R., 5 Ex. 67; Ex. Ch., L. R., 7 Ex. 96; and *Clark v. Chambers*, 3 Q. B. D. 327, may be referred to, as relating to negligence of more than one person, and the proximate cause of an accident.

Damages—Injunction.] Where the injury is by pulling down a house, in the possession of the plaintiff's tenant, the measure of damage, is the diminution in the saleable value of the premises, in consequence of the act done. *Hosking v. Phillips*, 3 Exch. 168. But where the nuisance is a continuing one, *i.e.*, caused by repeated acts of the same nature, so that successive actions may be brought, the measure of damages, is the amount of injury sustained, up to the time of the assessment of damages (see Rules, 1883, O. xxxvi. r. 58, *ante*, p. 295). *Hole v. Chard Union*, (1891) 1 Ch. 293, C. A., and the jury may upon a further action, give substantial damages. *Battishill v. Reed*, 18 C. B. 696; 25 L. J., C. P. 290; see *Shadwell v. Hutchinson*, 2 B. & Ad. 97. The defendant's intention, in doing the act, is to be taken into consideration in assessing the damages. *Embley v. Myers*, 6 H. & N. 54; 30 L. J., Ex. 71; *Thompson v. Hill*, L. R., 5 C. P. 564. When the action is for the wilful obstruction of the plaintiff's right of way, the jury may give exemplary damages. *Bell v. Midland Ry. Co.*, 10 C. B., N. S. 287; 30 L. J., C. P. 273.

Where a nuisance is continuing in its nature, an injunction will be granted to abate it, and this is the most effective remedy. *Metropolitan Asylum District v. Hill*, *Sturges v. Bridgman*, *post*, p. 773. An injunction will be granted, in an action by the Att.-Gen., on behalf of the public, to restrain the illegal interference with a public right, *e.g.*, that of passage along a navigable stream or highway; without proof of damage. *Att.-Gen. v. Shrewsbury Bridge Co.*, 21 Ch. D. 752.

Where the action is brought for an injunction the Court may still, notwithstanding the repeal of Cairns' Act, 21 & 22 V. c. 27, s. 2, by 46 & 47 V. c. 49, s. 3, grant damages in lieu thereof. *Chapman v. Auckland Union*, 23 Q. B. D. 294, C. A.; see also *Sayers v. Collyer*, 28 Ch. D. 103, C. A.

Formerly the court did not adopt this alternative unless the injury to the plaintiff's legal rights was (1) small, (2) capable of being estimated in money, (3) could be adequately compensated for by a small money payment, and, (4) the cause was one in which it would be oppressive to grant an injunction. *Shelfer v. City of London Electric Lighting Co.*, (1895) 1 Ch. 287, 322, *per* A. L. Smith, L.J. But since *Colls v. Home and Colonial Stores*, (1904) A. C. 179, D. P., *post*, p. 821, "as a general rule the Court ought to be less free in granting mandatory injunctions than it was in years gone by." *Kine v. Jolly*, (1905) 1 Ch. 480, 504, *per* Cozens Hardy, L.J., see however *Higgins v. Betts*, (1905) 2 Ch. 210, 217, *per* Farwell, J.

A *quia timet* action to restrain an apprehended injury can be maintained only where the plaintiff proves that danger of a substantial kind is imminent, or that the apprehended injury, if it occur, will be irreparable. *Fletcher v. Bealey*, 28 Ch. D. 688; *A.-G. v. Manchester Cor.*, (1893) 2 Ch. 87; *A.-G. v. Nottingham Cor.*, (1904) 1 Ch. 673. In such case damages cannot be granted in lieu of an injunction. *Dreyfus v. Peruvian Guano Co.*, 43 Ch. D. 319, C. A.; *Cowper v. Laidler*, (1903) 2 Ch. 337. As to the admissibility of collateral evidence in such action, *vide ante*, p. 84.

As to the form of injunction against noxious vapours, see *Shott's Iron Co. v. Inglis*, 7 Ap. Ca. 518, D. P.; *Fleming v. Hislop*, 11 Ap. Ca. 686, D. P.

Abatement.] A neighbour W. has no right to enter upon J.'s land in order to abate a nuisance of filth without previous notice or request to J. to remove it, unless J. was the original wrong-doer by placing it there, or it arises from default in the performance of some legal duty of J., or the nuisance is immediately dangerous to life or health. *Jones v. Williams*, 11 M. & W. 176. But where W. can abate the nuisance without going on J.'s land, as where the boughs of J.'s trees overhang W.'s land, he may do so by lopping them without notice to J., even although they have so overhung for more than 20 years, for no right or easement can be acquired by J. in respect of the boughs. *Lemmon v. Webb*, (1895) A. C. 1, D. P. *Seamble*, the same rule applies also to the roots of J.'s trees growing within W.'s land. S. C., (1894) 3 Ch. 1, *per* L.J.J. As to abatement of a public nuisance, *vide ante*, p. 759.

Defence.

By Rules, 1883, O. xix. r. 17, a defendant cannot plead a general denial of the allegations, in the statement of claim; and r. 15 requires him to state all such facts, on which he relies, as do not appear therein, and if not stated, would be likely to take the plaintiff by surprise. See rules cited *ante*, p. 309.

Where an act which, if permanent, would constitute a nuisance, is temporary only, and for a lawful object, no action lies. *Harrison v. Southwark, &c., Water Co.*, (1891) 2 Ch. 409. See also *Bamford v. Turnley*, 3 B. & S. 83, 84; 31 L. J., Q. B. 293, 294, *per* Bramwell, B. As to what act is temporary only, see *Colwell v. S. Pancras Council*, (1904) 1 Ch. 707.

It is a good defence, to show, that what was *prima facie* a nuisance, arose unavoidably, from the performance by the defendants, of acts expressly sanctioned by the legislature, *e.g.*, injury, caused by a railway company by working trains with locomotive engines; *R. v. Pease*, 4 B. & Ad. 30; *Hammersmith & City Ry. Co. v. Brand*, L. R., 4 H. L. 171, cited *post*, p. 793; *A.-G. v. Metropolitan Ry. Co.*, (1894) 1 Q. B. 384, C. A., or by making and using cattle yards; *L. B. & S. C. Ry. Co. v. Truman*, 11 Ap. Ca. 45, D. P., or caused by working trams by electricity; *Nat. Telephone Co. v. Baker*, (1893) 2 Ch. 186; and *E. & S. African Telegraph Co. v. Cape Town Tramways Co.*, (1902) A. C. 381, J. C. See also *Cracknell v. Thetford*, Mayor of, L. R. 4 C. P. 629. But they must show that by express

words or necessary implication the legislature intended to take away the private rights of individuals. *Metropolitan Asylum District v. Hill*, 6 Ap. Ca. 193, 288, *per* Ld. Blackburn; *accord. Canadian Pacific Ry. Co. v. Parke*, (1899) A. C. 535, J. C. See *Gaslight & Coke Co. v. St. Mary Abbots, Kensington*, 15 Q. B. D. 1, C. A. And the defendants will be liable, if their acts cause needless injury, or if they do not take reasonable steps, within their powers, for averting such injury. *Geddis v. Bann Reservoir Co.*, 3 Ap. Ca. 430, D. P. See *Hawthorn Cor. v. Kammulwik*, (1906) A. C. 105, J. C. So, a statutory power to the defendants to run trams along a highway over the rails of another company, assumes that the rails are in proper condition: if they be defective so that damage is in consequence caused by the tram to the plaintiff standing on the highway, the defendants are liable. *Sadler v. S. Staffordshire, &c., Tramways Co.*, 23 Q. B. D. 17, C. A. A gas company under the Gasworks Clauses Acts, 1847, 1871, is expressly liable for private nuisances they may commit in making or supplying gas (11 & 12 V. c. 15, s. 29; 34 & 35 V. c. 41, s. 9), *Jordeson v. Sutton, &c., Gas Co.*, (1899) 2 Ch. 217, C. A., *vide post*, p. 813. So where a corporation M. is empowered to supply electric energy, with a proviso that it shall not be exonerated from proceedings for any nuisance caused by it, M. is liable for nuisance apart from any question of negligence. *Midwood & Co. v. Manchester Cor.*, (1905) 2 K. B. 597, C. A.

No right can be acquired by user to carry on a nuisance, as a noisy trade, unless it has been carried on for 20 years, under such circumstances as to constitute an actionable nuisance. *Sturges v. Bridgman*, 11 Ch. D. 852, C. A. See further *Rushmer v. Polsue, &c.*, (1906) 1 Ch. 234, 237, *per* Vaughan Williams, L.J. Nor is it any defence, that noises, complained of by the plaintiff, were not greater than were necessary, and unavoidable in the defendant's business. *S. C.*; *Elliotson v. Feetham*, 2 N. C. 134. See further *Bamford v. Turnley* and other cases cited, *ante*, p. 762.

Where the nuisance is by a single act, as by letting water into the plaintiff's mine, through a hole wrongfully made by the defendant, accord and satisfaction, or recovery in a former action, is a bar, for only one action lies, notwithstanding the occurrence of subsequent consequential damage. *Clegg v. Dearden*, 12 Q. B. 576. Where, however, the consequential damage is a necessary part of the cause of action, as in the case of disturbance of the right of support of the plaintiff's land, a fresh cause of action arises at each occasion of damage; *Darley Main Colliery Co. v. Mitchell*, 11 Ap. Ca. 127, D. P. (overruling *Nicklin v. Williams*, 10 Exch. 259; 23 L. J., Ex. 335; and *Lamb v. Walker*, 3 Q. B. D. 389); even although the damage has been accruing continuously from the time of the defendant's act; *Crumbie v. Wallsend Local Board*, (1891) 1 Q. B. 503, C. A. *Vide post*, p. 815. See also *Whitehouse v. Fellowes*, 10 C. B., N. S. 765; 30 L. J., C. P. 305, and *Brunsdon v. Humphrey*, 14 Q. B. D. 141, C. A., *post*, p. 782. The owner of minerals D. is not liable for damage caused to adjacent land by subsidence caused by their working by his predecessor in title, although no damage occurred till after D. came into possession. *Greenwell v. Low Beechburn Coal Co.*, (1897) 2 Q. B. 165; *Hall v. Norfolk, Dk. of*, (1900) 2 Ch. 493.

[*Statute of Limitation.*] By the Limitation Act, 1623, 21 J. 1, c. 16, s. 3, an action upon the case (other than for slander), must be brought within six years after the cause of such action. Where the *gist* of the action is the consequential damage, the time of limitation begins to run from the accruing of the consequential damage. *Roberts v. Read*, 16 East, 215; *Gillon v. Bodlington, Ry. & M.* 161; *Howell v. Young*, 5 B. & C. 59. Where a statute required an action to be brought within six months after the *matter* or *act done*, and the injury was caused by sinking a sewer, whereby the walls of the

plaintiff's house cracked, it was held that the action must be brought within six months from the time of the walls cracking. *Lloyd v. Wigney*, 6 Bing. 489; *Wordsworth v. Harley*, 1 B. & Ad. 391. Where plaintiff's house had been injured, by the sinking of the subsoil within six years, in consequence of the working of an adjacent mine by a neighbour more than six years before, the statute is no bar; *Bonomi v. Backhouse*, 9 H. L. C. 503; 34 L. J., Q. B. 181; *Darley Main Colliery Co. v. Mitchell*; *Crumbie v. Wallsend Local Board*, *ante*, p. 773.

As to when the statute runs, in the case of fraudulent concealment of the cause of action, *vide ante*, p. 681.

ACTION FOR NEGLIGENCE.

Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing something which a prudent and reasonable man would not do; and an action may be brought if thereby mischief is caused to another person, not intentionally. *Blyth v. Birmingham Waterworks Co.*, 11 Exch. 781, 784; 25 L. J., Ex. 212, 213, *per Alderson, B.*

Negligence is therefore the absence of care, more or less, according to the circumstances. *Vaughan v. Taff Vale Ry. Co.*, 29 L. J. Ex. 248, *per Willes, J.* It cannot arise unless there is a duty to take care, for "a man may be as negligent as he pleases towards the whole world if he owes no duty to them," and "in the absence of contract, an action for negligence cannot be maintained where there is no fraud," *per* *Ld. Esher, M.R.* *Le Lievre v. Gould*, (1893) 1 Q. B. 491, 496, 498, cited *post*, p. 800. See also the judgment of Bowen, L.J. S. C., *Id.* 499; *Caledonian Ry. Co. v. Mulholland*, (1898) A. C. 216, D. P.; and *Malone v. Laskey*, (1907) 2 K. B. 141, C. A.

The following are some of the most common causes of action included under this head.

Negligent Driving of Carriages and Railway Trains.

Negligence of the defendant.] An allegation that the *defendant* so negligently drove, &c., is supported by evidence that his servant was the driver. *Brucker v. Fromont*, 6 T. R. 659. But a master is not answerable for the wilful and malicious act of his servant. *M'Manus v. Crickett*, 1 East, 106. Thus, where the defendant's servant wantonly, and not for the purpose of executing his master's orders, strikes the plaintiff's horses, and thereby produces the accident, the master is not liable; but where the servant, in the course of his employment, and in order to extricate himself from a difficulty, so strikes them, although injudiciously, his master is liable. *Croft v. Alison*, 4 B. & A. 590. *Accord.* *Limpus v. L. General Omnibus Co.*, 1 H. & C. 526; 32 L. J., Ex. 34, Ex. Ch. The defendants were held liable for the act of their driver, who pulled his horses across the road in front of the plaintiff's omnibus, and so overturned it; for this was clearly done in the course of the driver's employment, although the act of the driver was contrary to the regulations of the company. S. C. And see *Whatman v. Pearson*, L. R., 3 C. P. 422; *Burns v. Poulson*, L. R., 8 C. P. 563; *The Thetis*, L. R., 2 Adm. 365, *post*, p. 785, and cases collected, *post*, p. 913, and *sub tit. Actions against Companies—Torts*, *post*, p. 1094. But where the conductor of an

omnibus drives it, the owners are not *prima facie* liable for his negligence. *Beard v. L. Gen. Omnibus Co.*, (1900) 2 Q. B. 530, C. A. And where the carman B. of the defendant A. was directed to deliver A.'s goods at a certain place, and B. drove A.'s cart, with the goods in it, in an opposite direction, it was held that A. was not liable for an injury done by the cart while it was being so driven by B. *Storey v. Ashton*, L. R., 4 Q. B. 476; *Rayner v. Mitchell*, 2 C. P. D. 357; see also *Williams v. Jones*, 3 H. & C. 256; 33 L. J., Ex. 297; and *Tebbutt v. Bristol & Exeter Ry. Co.*, L. R., 6 Q. B. 73. So where the cart had been lent for value by C. to A., and was, under similar circumstances, injured by B.'s negligence, A. is not liable to C. on his contract of bailment. *Sanderson v. Collins*, (1904) 1 K. B. 628, C. A., distinguishing *Compé Co. v. Maddick*, (1891) 2 Q. B. 413, on the ground that in that case B. was acting within his authority; see further *Cheshire v. Bailey*, (1905) 1 K. B. 237, C. A. A servant has no implied authority to authorise another person to act for him as servant on his master's behalf, unless there is a necessity for such employment. *Gwilliam v. Twist*, (1895) 2 Q. B. 84, C. A. And *quere?* whether even if there be such necessity. *Id. per* Ld. Esher, M.R. Where A. contracted with the Postmaster-General for mail coaches, and B. contracted to supply horses and drivers, and hired W. to drive one of them, who met with an accident occasioned by a defect in the coach, it was held that W. could not sue A. *Winterbottom v. Wright*, 10 M. & W. 109; nor could he sue C. who was employed by A. to repair the coach, and had done so negligently. *Earl v. Lubbock*, (1905) 1 K. B. 253, C. A. Where the negligence of F.'s servant M. gives opportunity for a third person to commit a wrongful or negligent act producing damage, it is a question of fact whether M.'s negligence was the effective cause of the damage, when it is so M.'s master, F., is liable. *Engelhart v. Farrant*, (1897) 1 Q. B. 240, C. A. But not otherwise, *McDowall v. Gt. W. Ry. Co.*, (1903) 2 K. B. 331, C. A.

A master cannot maintain an action *per quod servitium amisit*, against a railway company for an injury to his servant, whilst a passenger on the company's railway, caused by neglect of their duty to safely carry the servant, according to their contract with him as such passenger, unless the master was a party to the contract; *Alton v. Midland Ry. Co.*, 19 C. B., N. S. 213; 34 L. J., C. P. 292; but the master may sue another company, whose negligence has caused the injury. *Berringer v. Gt. E. Ry. Co.*, 4 C. P. D. 163. See also *Meux v. Gt. E. Ry. Co.*, (1895) 5 Q. B. 387, C. A. Where a child was received as a passenger, without his fare being paid, under the erroneous belief that he was entitled to go free, it was held, that the company were bound to carry him without negligence. *Austin v. Gt. W. Ry. Co.*, L. R., 2 Q. B. 442. And a company may be liable in *tort*, for not safely carrying, although the contract of carriage was entered into with another company. Thus, where a passenger took a ticket of company A., for a journey over the lines of companies A., B. and C., and a collision occurred on the B. railway, by reason of the train in which the plaintiff was, running into trucks negligently left on the line; and it was held that the B. company were liable to the plaintiff, in an action of negligence. *Reynolds v. N. E. Ry. Co.*, C. P. 1868, *ex rel. amici*; cited in *Foulkes v. Metropolitan District Ry. Co.*, 5 C. P. D. 169, by Thesiger, L.J. And where a railway company invite, or permit a passenger, to travel by their train, they are bound to act without negligence towards him, although he travel under a ticket issued by another company. S. C.; 4 C. P. D. 267; 5 C. P. D. 157, C. A. See also *Skinner v. L. & Brighton Ry. Co.*, 5 Exch. 787. See further as to the liability of carriers, in respect of their negligence in the carriage of goods, and of passengers, and their luggage, respectively, at the suit of persons not parties to the contract of carriage, *ante*, pp. 635, 651,

652, 654. As to special terms as to non-liability for negligence, *vide ante*, pp. 641 *et seq.*, 652.

Where A. and B. were jointly interested in the profits of a common stage-waggon, but, by a private agreement between themselves, each undertook the management of the waggon, with the driver and horses, for a specified distance, it was held by Gibbs, C.J., that they were, notwithstanding this private agreement, jointly responsible to third persons for the negligence of their drivers throughout the whole distance; and that an averment, that the negligence was occasioned by the driver of A. (against whom alone the action was brought), was supported by proof, that the driver was actually employed by B., in conducting the waggon for his own stages. *Wuland v. Elkins*, 1 Stark. 272; *Fromont v. Coupland*, 2 Bing. 170. Where P. and Q. jointly hired a carriage and rode therein, P. driving; Q. was held liable for P.'s negligence. *Davey v. Chamberlain*, 4 Esp. 229. So where A. borrowed a horse and chaise of B. and rode therein with C., who drove, A. was held liable for C.'s negligence. *Wheatley v. Patrick*, 2 M. & W. 650. Where a stable-keeper let horses to a person, to draw his carriage, and the horses were driven by the servant of the stable-keeper, *Ld. Ellenborough, C.J.*, held that the latter was liable for any accidents occasioned by the post-boy's misconduct on the road. *Dean v. Branthwaite*, 5 Esp. 35; *Sammell v. Wright*, *Id.* 263; *Houghton's case*, cited 5 B. & C. 550. So the owner of a boat and crew was held liable for carelessness of the crew, though they had been hired for the day by a ferryman, to whom plaintiff had paid the fare. *Dalyell v. Tyrer*, E. B. & E. 899; 28 L. J., Q. B. 52.

Where a contractor employed to do a lawful act which would not, in the natural course of things, be likely to cause injury to others, does it negligently, the contractor alone, and not the employer, is responsible; *vide ante*, p. 766. Thus, where A., the owner of a carriage, hired of B., a stable-keeper, a pair of his horses to draw it for the day, and B. provided a driver, C., who received no wages but a gratuity from A., and C. was guilty of negligent driving, it was held that A. was not liable to be sued for such negligence. *Laugher v. Pointer*, 5 B. & C. 547 (where, however, the court was equally divided); *Quarman v. Burnett*, 6 M. & W. 499; *Jones v. Liverpool, Cor. of*, 14 Q. B. D. 890; *accord. The Quickstep*, 15 P. D. 196, 200; even though C. was provided, during the drive, with livery belonging to A., and the accident happened, owing to C.'s leaving the carriage, while returning the livery. *Quarman v. Burnett, supra*. In such cases it is a question of fact whether C. was acting as the servant of A. or of B. at the time of the accident, and on that fact depends the liability of A. or of B. *Brady v. Giles*, 1 M. & Rob. 494, *cor. Ld. Abinger, C.B. Accord. Jones v. Scullard*, (1898) 2 Q. B. 565, 571; *Waldock v. Winfield*, (1901) 2 K. B. 596. See further cases cited *ante*, pp. 766, 767, and *post*, p. 799. Where the defendant, the owner of the carriage, sat on the box, and did not interpose to prevent the postillions forcing their way amongst other carriages, whereby the injury was done, and he afterwards used expressions admitting his responsibility, this was held to be *evidence*, of a joint act of trespass, by the defendant and postillions. *McLaughlin v. Pryor*, 4 M. & Gr. 48. And where a servant uses his own horses and gig on his master's business, and with his knowledge, the master is liable, though the servant may, on the same occasion, do business of his own. *Patten v. Rea*, 2 C. B., N. S. 606; 26 L. J., C. P. 235. Where A. lends his servant S. to B. for a particular employment, S. must, for anything done in that particular employment, be dealt with as the servant of B., although he remains the general servant of A. *Rourke v. White Moss Colliery Co.*, 2 C. P. D. 205, 209, C. A.; *Donovan v. Laing, &c. Syndicate*, (1893) 1 Q. B. 629, C. A. Where a metropolitan cab proprietor, P., lets a horse and cab to a driver, D., on the usual terms, *viz.*:—that P. feeds the horse and exercises

no control over D. after he leaves the yard, for which D. pays P. a fixed sum a day, retaining any surplus earnings for himself, it has been held that, under the Metropolitan Hackney Carriage Acts, so far as the public is concerned, P. is liable for the acts of D., within the scope of the purposes for which the cab was entrusted to him, as though the relation of master and servant existed between them. *Venables v. Smith*, 2 Q. B. D. 279; *King v. Improved Cab Co.*, 23 Q. B. D. 281, C. A. So where P. lets D. the cab alone by the week. *Keen v. Henry*, (1894) 1 Q. B. 292, C. A. In these cases P. is liable although he be not the licensed proprietor. *Gates v. R. Bill*, (1902) 2 K. B. 38, C. A. And where the name and address of P. was on the cab, he was held responsible for loss of luggage of the hirer carried. *Powles v. Hider*, 6 E. & P. 207; 25 L. J., Q. B. 331. See *Fowler v. Lock*, *post*, p. 804.

Evidence of negligence.] In the case of an accident on a railway "it is not enough for the plaintiff to show that there has been an accident upon their line, and thence to argue that therefore the company are liable even *primâ facie*. It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to; and I go further and say that the plaintiff should also show with reasonable certainty what particular precaution should have been taken." *Daniel v. Metropolitan Ry. Co.*, L. R., 3 C. P. 216, 222, *per* Willes, J.; approved in *S. C. Id.*, 591, Ex. Ch., and L. R., 5 H. L. 45, D. P., though the judgment was reversed on the inferences of fact. *Jackson v. Id.*, 3 Ap. Ca. 193, D. P. If there be no reasonable evidence of negligence, occasioning the injury, the judge is bound to direct a verdict for the defendant. *S. C.*; *Davey v. L. & S. W. Ry. Co.*, 12 Q. B. D. 70, C. A.; *Wakelin v. L. & S. W. Ry. Co.*, 12 Ap. Ca. 41, D. P.; *Members v. Gt. W. Ry. Co.*, 14 Ap. Ca. 179, D. P. But the accident may take place under such circumstances as to be *primâ facie* evidence of negligence, for the happening of something that would not happen if ordinary skill and care were used, is evidence of negligence. *Gee v. Metropolitan Ry. Co.*, L. R. 8 Q. B. 161, 175, *per* Brett, J. See further cases cited *infra*. In *Gt. W. Ry. Co. of Canada v. Braid*, 1 Moo. P. C., N. S. 103, where an embankment over which a railway was carried had given way in consequence of a fall of rain of unusual severity, the company were held responsible, as they ought to have constructed their works in such a manner as to be capable of resisting all the violence of weather which in the climate of Canada might be expected, though perhaps rarely, to occur. But this case has not been altogether approved; see *per* Willes, J., in *Czech v. G. Steam Navigation Co.*, L. R., 3 C. P. 14, 16; and where a railway was injured by an extraordinary flood, the state of the road being such that it was secure against ordinary floods, the company were held not liable for injury to a passenger from misplacement of the rails. *Withers v. N. Kent Ry. Co.*, 27 L. J. Ex. 417; and see also *Blyth v. Birmingham Waterworks Co.*, 11 Exch. 781; 25 L. J., Ex. 212, *post*, p. 800; and *Nichols v. Marstrand*, 2 Ex. D. 1, *post*, p. 791.

Negligence is disproved by showing another sufficient cause, as a stone wilfully put on the rail by a stranger. *Latch v. Rumner Ry. Co.*, 27 L. J. Ex. 155. So, if the accident is consistent with due care, as where the carriage runs off the rail, from some unexplained cause, this is at most only *primâ facie* evidence of their negligence; *Bird v. Gt. N. Ry. Co.*, 28 L. J., Ex. 3; but a collision between trains, of the same company, is *primâ facie* evidence of their negligence. *Skinner v. L. & Brighton Ry. Co.*, 5 Exch. 787. So is an accident to a train, where both train and railway are under the exclusive management of the same company. *Carpue v. Id.*, 5 Q. B. 747. And a passenger may be alleged, to be carried by the company, though he in fact

bought his ticket of a society which had specially hired the train of the company, and sold the tickets. *Skinner v. Id.*, ante, p. 777. Where a train of the defendant's, whilst stationary on their railway, was run into by another train, and the latter train was in fault, it was held, that in the absence of evidence to the contrary, it must be presumed that the train which caused the accident was under the control of the defendants, although it was shown that several other railway companies had running powers over that part of the line. *Ayles v. S. E. Ry. Co.*, L. R., 3 Ex. 146. But where the collision is between two trains, or carriages, shown to be under independent control, the case would seem to fall within the ordinary rule, which requires special proof of negligence, of the party sued.

Proof that a stage-coach broke down raises a presumption that the accident arose either from the unskillfulness of the driver or the insufficiency of the coach. *Christie v. Griggs*, 2 Camp. 79; *Curtis v. Drinkwater*, 2 B. & Ad. 169. And the owner had been held liable for the insufficiency of the coach, although the defect be out of sight, and not discoverable upon ordinary examination. *Sharp v. Gray*, 9 Bing. 457. So, in *Burns v. Cork & Bandon Ry. Co.*, 13 Ir. C. L. R. 543, where an accident had happened owing to the breaking of a crank-pin, it was held that the railway company did not exonerate themselves, by showing that they had duly and properly examined the pin, and had not at any time before the fracture, any notice of the defect in the pin, as this was consistent with negligence in purchasing and procuring it. So, where the accident has arisen, through the negligence of any person, who has been engaged in constructing the carriage, &c., that has broken down, the company are liable, and cannot shield themselves, on the ground that the person guilty of the negligence was an independent contractor. See *Francis v. Coekrell*, L. R., 5 Q. B. 184; *Id.* 501, Ex. Ch., post, p. 800. But, although a carrier of persons is bound to use the utmost skill in everything concerning the safety of his passengers, yet he is not bound at his peril to provide a roadworthy carriage, and if the carriage turn out to be defective he is not liable to a passenger for the consequences if the defect could not be guarded against in the process of construction, nor discovered by subsequent examination. *Readhead v. Midland Ry. Co.*, L. R., 2 Q. B. 412; L. R., 4 Q. B. 379, Ex. Ch.; see also *Grote v. Chester & Holyhead Ry. Co.*, 2 Exch. 251. The obligation of a jobmaster in respect of the roadworthiness of a carriage hired of him, is the same as that of a carrier of passengers. *Hyman v. Nye*, 6 Q. B. D. 685. Where the plaintiff was driven by B. in his carriage gratuitously, B. is not bound to use this amount of care. *Moffat v. Bateman*, L. R., 3 P. C. 115. B. would however be liable for damage arising from the want of due care under all the circumstances. *Harris v. Perry & Co.*, (1903) 2 K. B. 219. Where a coach, which is overloaded, breaks down, the excess in the number of passengers has been held to be evidence that the accident arose from the overloading. *Israel v. Clark*, 4 Esp. 259. Where a passenger in an omnibus was injured by one of the horses kicking through the panel, and there were marks of previous kicks on the omnibus, and the horse had no kicking strap, it was held that there was evidence of negligence. *Simson v. L. General Omnibus Co.*, L. R., 8 C. P. 390. The fact that there had been default by a railway company in providing communication with the guard, as required by 31 & 32 V. c. 119, s. 22 (cited post, p. 798), coupled with evidence that the accident might have been prevented if the communication had existed, must be left to the jury as evidence of negligence. *Blamires v. Lancashire and Yorkshire Ry. Co.*, L. R., 8 Ex. 283, Ex. Ch.

Where the injury is the result of mere accident, no action lies; thus, where the coachman was driving in the middle of the road, and not on his own side, but there were no other coaches on the road, and the horses took fright and overturned the coach, it was held to afford no evidence of negligence. *Aston*

v. Heaven, 2 Esp. 533; *Wakeman v. Robinson*, 1 Bing. 213. To maintain an action, the act must have been wilful, or the result of negligence. *Holmes v. Mather*, L. R., 10 Ex. 261. Therefore, where the evidence given, is as consistent, with there having been no negligence on the part of the defendant, as with there having been negligence, the judge is not warranted in leaving it to the jury, to find either alternative; he is bound to direct a verdict for the defendant. *Cotton v. Wood*, 8 C. B., N. S. 568; 29 L. J., C. P. 333; and see *Daniel v. Metropolitan Ry. Co.*, and *Jackson v. Id.*, ante, p. 777. So, where the accident arises from foggy weather, or the removal of accustomed landmarks. *Crofts v. Waterhouse*, 3 Bing. 319, 321. So, where an injury was inflicted by a horse, which the defendant was riding or driving, and there is no proof, that he omitted to do anything in his power to prevent the accident. *Hammack v. White*, 11 C. B., N. S. 588; 31 L. J., C. P. 129; *Manzoni v. Douglas*, 6 Q. B. D. 145. In *Wordsworth v. Willan*, 5 Esp. 273, the rule, with regard to keeping the road, is said to be, that if a carriage, coming in any direction, leave sufficient room for any other carriage, horse, or passenger on its side of the way, it is enough; and in *Wayde v. Carr*, 2 D. & Ry. 256, the court said that the "law of the road," was not to be considered as inflexible; since, in crowded streets, situations and circumstances might frequently arise, where a deviation from what is called the law of the road, would not only be justifiable, but absolutely necessary. Where the defendant was driving on the wrong side of the road, which was of considerable breadth, and the plaintiff's servant, who was on horseback, without any reason, crossed over to the side on which the defendant was driving, and on endeavouring to pass, his horse was killed, Ld. Kenyon held, that it was putting himself voluntarily into danger, and that the injury was of his own seeking; but the jury found a verdict for the plaintiff, which the K. B. refused to disturb. *Cruden v. Fentham*, 2 Esp. 685. And although a person is not bound to confine himself to his proper side of the road, yet, if he do not, he is bound to use a greater degree of caution, than if he kept the proper side. *Pluckwell v. Wilson*, 5 C. & P. 375. And, generally, disobedience to the rule is evidence against the driver, as between the two carriages; but in the case of an injury to a person crossing on foot, it is not evidence against the driver. *Lloyd v. Ogleby*, 5 C. B., N. S. 667. It may be observed, that in the case of highways, not regulated by special acts, the law of the road, is a statutory enactment under 5 & 6 W. 4, c. 50, s. 78. The word "carriage" in that act includes a bicycle, tricycle, velocipede, or other similar machine; 51 & 52 V. c. 41, s. 85 (1). See also *Taylor v. Goodwin*, 4 Q. B. D. 228. Foot passengers, in crossing a highway, are bound to take due caution to avoid vehicles, and the drivers of vehicles, are bound to take due caution to avoid foot passengers. *Cotton v. Wood*, ante, p. 779.

In order to subject the master to damages, it must appear that there has been something to blame on the part of his servant; and he is blamable if he have not exercised the best and soundest judgment on the subject; per Ld. Ellenborough, C. J., *Jackson v. Tollett*, 2 Stark. 39. The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road, on which he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength, and properly made, and also with lights by night; per Best, C.J., *Crofts v. Waterhouse*, 3 Bing. 321. If the driver may adopt either of two courses, one of which is safe and the other hazardous, and he elect the latter, he is responsible for the mischief which ensues. *Mayhew v. Boyce*, 1 Stark. 423. If the driver of a stage-coach, neglect to inform an outside passenger of his danger, where the way passes through a low archway, the owner of the coach is liable for the injury. *Dudley v. Smith*, 1 Camp. 167. A passenger, being, in consequence of the negligence of the defendant, placed in a situation,

which obliges him to adopt the alternative of leaping from the coach or remaining at certain peril, leaps and is hurt, the defendant is liable, if it appear that the leaping was on the whole a prudent precaution for the purpose of self-preservation. *Mayhew v. Boyce*, *ante*, p. 779. But if the defendant's negligence merely inflict a slight inconvenience on the plaintiff, and he choose to endeavour to escape the inconvenience, by exposing himself to considerable danger, he must do so at his own peril. *Adams v. Lancashire, &c. Ry. Co.*, L. R., 4 C. P. 739. The principle of this case was approved in *Gee v. Metropolitan Ry. Co.*, L. R., 8 Q. B. 161, Ex. Ch. These two cases are cited *post*, p. 797.

Where the plaintiff rests his case on the presumption of negligence, arising from the fact of the coach breaking down, the defendant may show, that the coach was examined a few days before the accident, and no flaw discovered; and that the coachman, a skilful driver, was driving in the usual track, and at a moderate pace, though this, of course, is not conclusive evidence. *Christie v. Griggs*, 2 Camp. 81.

The defendant may show that the immediate and proximate cause of the injury, was the unskilfulness or negligence of the plaintiff, or, as it is usually expressed, that the plaintiff has been guilty of contributory negligence. *Flower v. Adam*, 2 Taunt. 315; *Williams v. Holland*, 10 Bing. 112; *Vennall v. Garner*, 1 Cr. & M. 21; *Marriott v. Stanley*, 1 M. & Gr. 568; *Adams v. Lancashire, &c., Ry. Co.*, *ante*, p. 780; *Holden v. Liverpool Gas Co.*, 3 C. B. 1, *post*, p. 794. But, "although there may have been negligence, on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong." *Bridge v. Gd. Junction Ry. Co.*, 3 M. & W. 244, 248, *per* Parke, B. *Accord. Tuff v. Warman*, 2 C. B., N. S. 740; 26 L. J., C. P. 263; 5 C. B., N. S. 573; 27 L. J., C. P. 322, Ex. Ch.; *The Vera Cruz*, 9 P. D. 88, 93, 94; *The Monte Rosa*, (1893) P. 23. So, the plaintiff is entitled to recover, if the defendant might, by the exercise of ordinary care and diligence, have avoided the consequences of the neglect, or carelessness, of the plaintiff. S. C.; *Radley v. L. & N. W. Ry. Co.*, 1 Ap. Ca. 754, D. P. Thus, if the plaintiff, or his driver, drive furiously, yet if the jury find, that the collision was owing to the defendant's fault, the plaintiff ought to recover, although, if he had been driving slowly, he might have avoided the effect of the collision. *Rigby v. Hewitt*, 5 Exch. 240. Where the plaintiff had improperly left an ass on the high road, and the defendant, by negligently driving too fast, ran over and killed it, he was held liable to the owner of the ass. *Davies v. Mann*, 10 M. & W. 546. So, where an object, as an oyster bed, or a jetty, are illegally situated in a navigable river, so as to obstruct it, and thereby create a public nuisance, a private person is liable to the owner of the object, if he negligently navigate his ships, so as unnecessarily to injure the object. *Colchester, Mayor of v. Brooke*, 7 Q. B. 339; *Dimes v. Petley*, 15 Q. B. 276; 19 L. J., Q. B. 449. See also *Spuight v. Tedcastle*, 6 Ap. Ca. 217, D. P.; *Child v. Hearn*, L. R., 9 Ex. 176, *post*, p. 795, and other cases cited *post*, pp. 785, 786. As to onus of proof, see *Slattery v. Dublin, Wicklow, &c. Ry. Co.*, 3 Ap. Ca. 1155, D. P.; *Davey v. L. & S. W. Ry. Co.*, 12 Q. B. D. 70, C. A.; *Wakelin v. L. & S. W. Ry. Co.*, 12 Ap. Ca. 41, D. P. Negligence, and want of care, on the part of the person, A., who drives the carriage, or conducts the vessel, in which the plaintiff is, is not equivalent, in respect of liability, to the plaintiff's own negligence, unless A. is either the servant or agent of the plaintiff. *The Bernina* (2), 12 P. D. 58, C. A.; 13 Ap. Ca. 1, D. P., overruling *Thorogood v. Bryan*, and *Catlin v. Hills*, 8 C. B. 115, 123; and *Armstrong v. Lancashire & Yorkshire Ry. Co.*, L. R., 10 Ex. 47. As to

when the plaintiff cannot recover on the ground that he took the risk on himself, in accordance with the maxim "*volenti non fit injuria*," *vide post*, pp. 798, 801, 805.

A doubt has been expressed, whether the negligence of the plaintiff be a defence, except where the action is founded in tort, and not on contract. See *Martin v. Gl. N. Ry. Co.*, 16 C. B. 179; 24 L. J., C. P. 209; and *Webb v. Page*, 9 M. & Gr. 196, cited *ante*, p. 651.

Where the defendant negligently left a cart and horse in a public street, and one of two children improperly playing with the cart, met with an accident, by falling from it, whilst the other was driving the horse on, it was held that the injured child might sue the defendant for the negligence. *Lynch v. Nurdin*, 1 Q. B. 29. But the liability here seems to have turned on the tender age of the plaintiff; for, if he had been a grown-up person, the injury would have been ascribed to his own act, and the action would have failed. *Lygo v. Newbold*, 9 Exch. 302; 23 L. J., Ex. 108. And contributory negligence, will deprive a child of his right of action. In these cases two children, A. and H. respectively, were plaintiffs; the defendants had placed the wooden lid of a cellar against the wall of a public street; H.'s dress caught the lid, with which he was playing, and it fell down, and injured both him and A.; it was held that the defendants were not liable for the injury to H., and their liability for the injury to A., depended upon whether H. and A. were playing together as joint actors. *Abbott v. Macfie and Hughes v. Id.*, 2 H. & C. 744; 33 L. J., Ex. 177. See further *Singleton v. E. Counties Ry. Co.*, 7 C. B., N. S. 237, *post*, p. 795. But where a highway was separated from the defendant's land by his fence, which was so defective as to be a nuisance, and a child, D., who was on the highway, put his foot on the fence which then fell over and injured him, it was held that the defendant was liable. *Harrold v. Watney*, (1898) 2 Q. B. 320, C. A. A woman, with a child five years old in her care, after taking tickets for herself and child, crossed the rail, when a train was in sight, whereby she was killed and the child hurt; the jury found that there was negligence of the company's servants, and also negligence of the deceased; it was held that the child was so identified with the deceased, that it could not recover compensation. *Waite v. N. E. Ry. Co.*, E. B. & E. 719; 27 L. J., Q. B. 417; Ex. Ch. E. B. & E. 728; 28 L. J., Q. B. 258.

The obligation of railway companies, to carry mails and post-office servants in charge of them, is founded on statute and not contract, though the terms are settled by contract, between the postmaster-general and the companies; and they are bound to carry the servants with due care; and if an injury happen to one, by negligence of the company, the servant may sue them; and if the accident happen by the plaintiff's negligence it is a defence. *Collett v. L. & N. W. Ry. Co.*, 16 Q. B. 984; 20 L. J., Q. B. 411.

It seems, that if the injury is occasioned by the contributory wrong of a third person, this affords no defence. See *Abbott v. Macfie*, *supra*; *Harrison v. Gl. N. Ry. Co.*, 3 H. & C. 231; 33 L. J., Ex. 266; *Hill v. New River Co.*, 9 B. & S. 303, *ante*, p. 771; *Clark v. Chambers*, 3 Q. B. D. 327.

Where the defendants, while the plaintiff is driving his cattle across the defendant's line at a level crossing, negligently ran trucks down the line, and thereby separated and frightened the cattle, so that the plaintiff lost control of them, and the cattle, in consequence, and without the plaintiff's default, strayed, and were injured, it was held that the injury was the direct result of the defendant's act, and that they were liable for the damage thereby caused. *Snecsbey v. Lancashire & Yorkshire Ry. Co.*, L. R., 9 Q. B. 263; 1 Q. B. D. 42, C. A.

The obligations of carriers of goods or passengers, as founded on contract, have been already considered under a former head. *Ante*, pp. 631, 651.

Where by one act of negligence, personal injury is caused to A., and also damage to his carriage, it has been held that he may bring successive actions for this damage, and for the personal injury; and recovery for the former is no bar to a recovery for the latter. *Brunsdon v. Humphrey*, 14 Q. B. D. 141, C. A.; accord. *Darley Main Colliery Co. v. Mitchell*, 11 Ap. Ca. 144, per *Ld. Bramwell*.

Damages.] In estimating the damages recoverable for a personal injury caused by negligence, the jury "must not attempt to give damages, to the full amount of a perfect compensation, for the pecuniary injury, but must take a reasonable view of the case, and give what they consider under all the circumstances, a fair compensation." *Rowley v. L. & N. W. Ry. Co.*, L. R. 8 Ex. 221, 231, per *Brett, J.*, adopted per *Cur* in *Phillips v. L. & S. W. Ry. Co.*, 4 Q. B. D. 406; affirm. 5 Q. B. D. 78, C. A. Accord. S. C., 5 C. P. D. 280, C. A.; and *Johnston v. Gt. W. Ry. Co.*, (1904) 2 K. B. 250 C. A. The jury may take into account, any reasonable prospect of increased income, which the plaintiff had, and of which he has been deprived by the injury. *Fair v. L. & N. W. Ry. Co.*, 18 W. R. 66, M. T. 1869, Q. B. They are not to take into account, any sum the plaintiff has received, under a policy of insurance against accidents. *Bradburn v. Gt. W. Ry. Co.*, L. R. 10 Ex. 1. See further, cases cited *post*, pp. 811, 812. Damages resulting from a nervous shock, caused by fright without actual impact are recoverable if the plaintiff has sustained physical injury. *Dulieu v. White*, (1901) 2 K. B. 669, not following *Victorian Ry. Comrs. v. Coultas*, 13 Ap. Ca. 292, J. C., where it was held that such damages were too remote.

Where a husband sued, *quod consortium amisit*, for an injury caused to his wife, by the defendant's wrongful act, and the wife died in consequence, *Ld. Ellenborough* held, that the plaintiff could only recover damages for loss up to the time of the wife's death, on the ground that at common law, "in a civil court the death of a human being, could not be complained of as an injury." *Baker v. Bolton*, 1 Camp. 493. On this principle a master cannot sue *quod servitium amisit*, when through the defendant's negligence, the servant was killed on the spot. *Osborn v. Gillett*, L. R., 8 Ex. 88; accord. *Clark v. L. Gen. Omnibus Co.*, (1906) 2 K. B. 648, C. A. Nor can a father recover the funeral expenses of an infant daughter, so killed, who was residing with him at the time of her death. S. C.

In an action against a stranger for loss of goods occasioned by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed. *The Winkfield*, (1902) P. 42, C. A., overruling *Claridge v. S. Staffordshire Tramway Co.*, (1892) 1 Q. B. 422.

Negligent Navigation of Ships.

Many cases have been decided on collision of ships, both in the courts of common law and Admiralty Court, and several acts, for regulating the navigation of British shipping, have from time to time been passed. These are now repealed by the Merchant Shipping Act, 1894,* 57 & 58 V. c. 60, which re-enacts the provisions of the previous acts which were in force in a consolidated form.

The M. Ship. Act, 1894, Part. V., contains provisions for the safety of ships, and sects. 418-424 relate to the prevention of collisions. By sect. 418 (1), His "Majesty may, on the joint recommendation of the Admiralty and the Board of Trade, by order in Council, make regulations for the prevention of collisions at sea, and may thereby regulate the lights to be carried and exhibited, the fog signals to be carried and used, and the steering and sailing rules to be observed, by ships, and those regulations (in this act

* Cited for brevity as M. Ship. Act, 1894.

referred to as the collision regulations) shall have effect as if enacted in this act." (2) "The collision regulations together with the provisions of this part of this act relating thereto, or otherwise relating to collisions, shall be observed by all foreign ships within British jurisdiction," and (sect. 424) by consent of any foreign country that the regulations may be extended to the ships of such country generally, an Order in Council may be made extending them to such ships as if they were British ships. Under the power conferred by sect. 418 the present regulations for preventing collisions at sea were made by Order in Council, of Nov. 27th, 1896. They will be found at (1896) P. 307 *et seq.* These regulations were extended to the ships of most foreign nations, when not within the jurisdiction of the country of the ship, by Order in Council, May 18th, 1897. See London Gazette, May 21st, 1897, p. 2826.

By sect. 419 (1), "all owners and masters of ships shall obey the collision regulations, and shall not carry or exhibit any other lights or use any other fog signals than such as are required by those regulations;" (3) "if any damage to person or property arises from the non-observance by any ship of any of the collision regulations, the damage shall be deemed to have been occasioned by the wilful default of the person, in charge of the deck of the ship at the time, unless it is shown, to the satisfaction of the court, that the circumstances of the case made a departure from the regulation necessary;" (4) where in a case of collision, it is proved to the court before which the case is tried, that any of the collision regulations have been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court, that the circumstances of the case, made departure from the regulation necessary."

By sect. 421 (1), in the case of any harbour, river, or other inland navigation, local rules concerning lights, signals, and the steps for avoiding collision, made under any local act, are allowed, and (2), in the absence of such act, may be made by Order in Council, and are then to have the same effect, as the collision regulations.

By sect. 422 (1), in cases of collision, the person in charge of each ship, is (a) to render to the other, such assistance as may be practicable and necessary; and (b) to give the name of his vessel, and of her port, &c., to the person in charge of the other vessel; and (2) if he, without excuse, fails to do so, the collision, in the absence of proof to the contrary, shall be deemed to have been caused by his fault.

By sect. 742 the word "ship" includes every description of vessel used in navigation not propelled by oars.

Under sect. 419 (4), when a ship has infringed any of the collision regulations, and a collision has happened, it is no defence that the infringement, if it might have contributed to the collision, did not in fact do so; *The Khedive*, 5 Ap. Ca. 876, D. P.; *The Arklow*, 9 Ap. Ca. 136, P. C.; *The Fanny M. Carvill*, 13 Ap. Ca. 455, n.; 2 Asp. Mar. Law Cas. 565, 569, *per J. C.*; but it is a defence, that the infringement was such, that it could not possibly have contributed to the collision; *S. C.*; *The Englishman*, 3 P. D. 18; *The Duke of Buccleugh*, 15 P. D. 86, C. A.; on appeal, *sub nom. Eastern S.S. Co. v. Smith*, (1891) A. C. 310, D. P., this principle was affirmed, though the judgment in C. A. was reversed on the facts; or that it was the only manœuvre which offered any chance of avoiding danger, which was otherwise inevitable; *The Benares*, 9 P. D. 16, C. A.; or that the circumstances were such that a competent seaman, exercising reasonable care, would not have discovered that the regulation was applicable. *The Theodore H. Rand*, 12 Ap. Ca. 247, D. P. Where the master of a tow V. is in a position to control the tug, and the latter infringes the regulations, the V. is "deemed to be in fault." *The Devonian*, (1901) P. 221. As to damages where the other vessel is also in fault, see *The Hibernia*, *post*, p. 788. Sect. 419 (4) does not

apply to the Rules for Navigation of the River Thames. *The Harton*, 9 P. D. 44; *Cayzer v. Carron Co.*, otherwise *The Margaret*, 9 Ap. Ca. 873, D. P. The rules now in force are those of 1898; they will be found in Marsden on Collisions at sea, 5th ed., App. p. 523: see thereon S. CC.; *The Ovingdean Grange*, (1902) P. 208, C. A.

A vessel with her anchor down, but not actually holden by it, is "under way," within the meaning of Regulations, art. 6, and is bound to exhibit coloured lights. *The Esk*, L. R., 2 Adm. 350. A steam tug hove to, with her engines stopped, is bound to keep out of the way of a sailing vessel, under art. 17. *The Jennie S. Barker*, L. R., 4 Ad. 456. It would seem that no action lies against the owner of a transport, in the employment of the Crown, for a collision, happening in the execution of the orders of an officer of the royal navy, in command of the ship. *Hodgkinson v. Fernie*, 3 C. B., N. S. 889; 26 L. J., C. P. 217. As to the liability of H.M. ships of war for damage caused by not following the collision regulations, see *H.M.S. Sans Pareil*, (1900) P. 267, C. A.

In sect. 442, "Person in charge," means the master, even though there is a pilot on board, by compulsion of law; *The Queen*, L. R., 2 Adm. 354; and in charge during any time life could have been saved: *Ex pte. Ferguson*, L. R., 6 Q. B. 280; but there is proof to the contrary, within *Id.* (2) when such pilot is alone to blame. *The Sussex*, (1904) P. 236. Sect. 742 does not exclude vessels propelled by oars. S. C. "Every vessel that substantially goes to sea, is a ship." S. C., *Id.* 291. And conversely, one that does not ordinarily proceed to sea is not a ship. *The C. S. Butler*, L. R., 4 Adm. 238. A hopper-barge is a ship. *The Mac*, 7 P. D. 126, C. A.

By sect. 633, neither owner nor master, is liable for loss or damage, occasioned by the fault or incapacity of a qualified pilot acting in charge of the ship, within any district, where the employment of one is compulsory. This section is in affirmance of the common law. *The Hector*, 8 P. D. 218, 224, *per* Brett, M.R. And where pilotage is compulsory by the law of a foreign country in which the collision occurs, the master and owner, are also exempt from liability in our courts, even though this would not be so, by the law of that country. *The Halley*, L. R., 2 P. C. 193. The exemption applies, even where the vessel doing the damage, was in tow. *The Ocean Wave*, L. R., 3 P. C. 205. But not to injury done by the tug. *The Mary*, 5 P. D. 14. In order, however, to take advantage of these exemptions from liability, there must have been no fault, on the part of the master and crew, which might have been conducive to the damage, though the onus of proving such default is in the first instance on the plaintiffs. *Clyde Navigation Co. v. Barclay*, 1 Ap. Ca. 790, D. P., explaining *The Iona*, L. R. 1 P. C. 426; *The Velasquez*, *Id.* 494; *The Indus*, 12 P. D. 46, C. A. It is the duty of the pilot to attend to the navigation of the ship, and of the master and crew to keep a good look-out; *The Iona*, *supra*; the latter are to obey the pilot's orders, relating to the navigation. *The City of Cambridge*, L. R. 5 P. C. 451. The owners are not liable if the pilot follow a suggestion of the master which causes the damage. *The Oakfield*, 11 P. D. 34. The same principles apply to a ship entering a harbour under the direction of the harbour master. *The Cynthia*, 2 P. D. 52; *The Mystery*, (1902) P. 115. A steam tug towing a vessel, which is compulsorily in charge of a pilot, must obey the pilot's orders. *Spaight v. Tedcastle*, 6 Ap. Ca. 217, D. P. The order of the pilot will not exonerate the shipowner from liability for exhibiting other than the statutory lights. *The Ripon*, 10 P. D. 65.

Where a pilot has been compulsorily taken on board a vessel, he does not become the servant of the owners, so as to make them liable for a collision, caused by his negligence, at a place where pilotage was not compulsory, provided the place is within the pilotage district. *General S. Navigation Co.*

v. British, &c. S. Navigation Co., L. R. 3 Ex. 330; L. R., 1 Ex. 238, Ex. Ch.; and see *Lucey v. Ingram*, 6 M. & W. 302. The apparent discrepancy between this case and *The Stettin*, B. & L. 199, is explained in *The Lion*, L. R., 2 P. C. 525, 531. Where the pilot, although compulsorily taken on board, is not compulsorily in charge, but is a mere adviser of the master, the owner is not exonerated from liability. *The Guy Munnering*, 7 P. D. 132, C. A.; *The Dullington*, (1903) P. 77.

Pilotage is rendered compulsory by several local and personal acts; the effect of these, is retained by the M. Ship. Act, 1894 (57 & 58 V. c. 69), s. 603 (1). See *Rodrigues v. Melhuish*, 10 Exch. 110; 24 L. J., Ex. 26; *Tyne Improvement Commissioners v. General S. Navigation Co.*, L. R., 2 Q. B. 65; *The Maria*, L. R., 1 Adm. 358; *The City of Cambridge*, ante, p. 784. The general provision on this subject is sect. 604 (1), which enacts, that the master of every ship, carrying passengers between any place, in the British Islands, and any other place so situate, when navigating upon any waters, situate within the limits of any district for which pilots are licensed, by any pilotage authority, under the provisions of that or of any other act, or upon any part thereof so situate, shall, unless he or his mate has a pilotage certificate, or a certificate under this section, applicable to the district and ship, employ a licensed pilot. Such certificate is not granted within the section, until it has been delivered out of the office to the master. *The Killarney*, 1 Lush. 427; 30 L. J., P. M. & A. 41. With regard to the jurisdiction to grant licences, see *Hossack v. Gray*, 34 L. J., M. C. 209, Q. B. The payment of a fare is necessary to constitute a passenger, within the meaning of the section. *The Lion*, L. R., 2 P. C. 525.

As to liability of the managing owner, registered as such, under the M. Ship. Act, 1894, s. 59, for negligence of the master of ship, see *Steel v. Lester*, 3 C. P. D. 121.

The common law liability of the master, as such, for the negligence of himself or his crew, is unaffected by the above provisions, except in case of the compulsory employment of a pilot. See ante, p. 472; Story on Agency, ss. 315, 317. It seems that salvage services to a vessel in distress fall within the ordinary scope of the master's duties, and that the owners will be liable if the master negligently bring his own ship into collision with, and so sink, the other vessel. *The Thetis*, L. R., 2 Adm. 365.

The plaintiffs may sue for injury to cargo, although they have indorsed away their bills of lading to secure advances; the money recovered is for the benefit of the persons proved to be entitled thereto. *The Glumorganshire*, 13 Ap. Ca. 454, J. C.

By section 458, in every contract of service between the owner and master or seamen or apprentice, there shall be implied, notwithstanding any agreement to the contrary, an obligation on the part of the owner, that he and the master, &c., shall use all reasonable means to insure the seaworthiness of the ship for the voyage when it commences, and to keep her in a seaworthy condition during the voyage. A ship properly equipped for encountering ordinary sea perils does not become unseaworthy within this section because the master neglected to use part of her equipment. *Hedley v. Pinkney & Sons S.S. Co.*, (1894) A. C. 222.

The following cases decided on the common law may be found useful in cases where the above acts and regulations do not apply.

Where the collision arose through inevitable accident, the defendant is not liable; inevitable accident is that which the person charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. *The Marpesia*, L. R., 4 P. C. 212, 220; *The Albano*, (1892) P. 319, per Fry & Lopes, L.JJ.; Ld. Esher, M.R., holding that the

defendant, in order to prove the defence, must show that something happened over which he had no control, and the effect of which could not have been avoided by the "greatest care and skill." *Id.* 429. The onus of proving the defence, is only thrown on the defendant, when a *prima facie* case of negligence, and want of due seamanship, is shown against him; for the plaintiff is bound to prove the defendant's negligence, as part of his case. *The Marpesia*, ante, p. 785. Where there is a *prima facie* case of negligence the defendant must rebut it by showing that the cause of the accident was not produced by him, and that he could not avoid its results. The defendant is not liable for damages caused by the mere failure of machinery to act; but the use of it after a similar prior failure may be evidence of negligence. *The European*, 10 P. D. 99. See also *The Merchant Prince*, (1892) P. 9; *Id.* 179, C. A.

Where the plaintiff has, by his own culpable negligence, substantially contributed to the accident, he cannot recover. *Vennall v. Garner*, 1 Cr. & M. 21; *Smith v. Dobson*, 3 M. & Gr. 59. But, though the plaintiff might have avoided collision, yet he may recover, if, under the circumstances, the plaintiff had a right to presume that the defendant would have given way, and so prevented the accident. *Vennall v. Garner*, supra; *Tuff v. Warman*, 5 C. B., N. S. 573; 27 L. J., C. P. 322, Ex. Ch. See also *Chadwick v. Dublin Packet Co.*, 6 E. & B. 771; *Spaight v. Tedcastle*, 6 Ap. Ca. 216, D. P.; and other cases cited ante, pp. 780, 781, and the rule, that if the plaintiff contribute to the accident, he cannot recover, will not extend to relieve the defendant from liability, merely because the plaintiff might have avoided it, by certain precautions. Thus, where the plaintiff, in a steamboat, the S., was injured by the fall of an anchor of the S., caused by collision with the defendant's steamboat, the B., it is no defence that the anchor may have been improperly stowed in the S., or that the plaintiff was standing on a part of the deck where he ought not to be. *Greuland v. Chaplin*, 5 Exch. 243. The defendant in such cases, is not entitled to expect, that the plaintiff shall be constantly on his guard, against the consequences of another person's misconduct. So, where a ship, B., has, by wrong manœuvres, placed another ship, A., in a position of extreme peril, the owners of A. will not be liable, if A. was then wrongly manœuvred. *The Bywell Castle*, 4 P. D. 219, C. A. See further, ante, p. 780. Where ship A. is compelled by negligent navigation of ship B. to alter her course, and so does damage to ship C., B. is liable to C. *The Sisters*, 1 P. D. 117. It is no defence that the vessel of the defendant became unmanageable by reason of a previous accident occasioned to it by the neglect of his crew. *Secombe v. Wood*, 2 M. & Rob. 290; *Romney Marsh, Lds. of, v. Trinity House*, L. R., Ex. 204; L. R., 7 Ex. 247, Ex. Ch.; *The George and Richard*, L. R., 3 Adm. 466.

The master is not liable for the wilful act of the crew, though he was on board at the time. *Bowcher v. Noidstrom*, 1 Taunt. 568. Although under an ordinary contract of towage, the tow has control over the tug and is liable for the wrongful acts of the latter, unless they were so sudden as to prevent the tow from controlling them; *The Niobe*, 13 P. D. 55; *The Englishman and The Australia*, (1894) P. 239; *The Deronian*, ante, p. 783; see also *McCowan v. Baine*, (1891) A. C. 401, D. P., yet no general rule as to this liability can be laid down, it depends on the circumstances of each case. *The Quickstep*, 15 P. D. 196. Where a ship, A., runs against and damages a ship, B., at anchor, A. is *prima facie* to blame. *The Annot Lyle*, 11 P. D. 114, C. A. As to injury to submarine cables, see *Submarine Telegraph Co. v. Dickson*, 15 C. B. N. S. 759; 33 L. J., C. P. 139. As to the liability of the owner of a ship sunk, in a public navigable river or harbour, for damage caused by her to other ships, see *The Utopia*, (1893) A. C., 492, 498, J. C.; *The Snark*, (1900) P. 105, C. A., and cases therein cited.

As to the liability of dock-owners for injury to ship caused by erroneous order for navigating her, given by their harbour master, see *Kenny v. Kirkcudbright, Magistrates of*, (1892) A. C. 261, D. P.

In an action against a shipowner for negligently leaving open a hatchway of a ship in dock, it was held that the register was *prima facie* evidence that the persons in charge of the ship were the servants of the defendants. *Hibbs v. Ross*, L. R., 1 Q. B. 534.

Damages.] The M. Ship. Act, 1894, Part VIII. (which by s. 509, applies to the whole of the Queen's dominions), in some cases limits the liability of shipowners for negligence. By sect. 502 the liability of "sea-going ships" for goods taken on board is limited, so far as relates to loss of or damage to goods, in the manner already specified, *ante*, pp. 474, 475. By sect. 503 (1), where loss of life, or personal injury, is caused to any person, or damage to any merchandise on board any ship, British or foreign, or where, from the improper navigation of such ship, the same injury or damage is caused, in relation to any other vessel, the owner, where these events occur, without his actual fault or privity, is not to be liable in damages, where there is loss of life, or personal injury, to an aggregated amount, exceeding 15*l.* for each ton of the ship's tonnage, or 8*l.* per ton, where there is damage to ships, goods, or merchandise—(2), registered tonnage, in the case of sailing ships, and by 6 E. 7, c. 48, s. 69, with the addition of any engine-room space deducted, in the case of steam vessels. See, on this section, *Glaholm v. Barker*, L. R., 1 Ch. 223, *post*, p. 810; *L. & S. W. Ry. Co. v. James*, L. R., 8 Ch. 241, *ante*, p. 475, and *The Victoria*, 13 P. D. 125. The defendant is also liable to pay interest on the amount from the time of collision; see *Smith v. Kirby*, 1 Q. B. D. 131; following the rule of the Admiralty Division stated below as to interest on damages. The limitation seems to extend to damage, caused by delay in carrying goods, under a contract of carriage, see cases cited *ante*, p. 475. Improper navigation falls within sect. 503, whether it arise from defect in the equipment, or in the manœuvring of the ship. *The Warkworth*, 9 P. D. 20, 145, C. A. As to the application of the limitation, when both vessels have been found to blame, see *The Khedive*, 7 Ap. Ca. 795, D. P. As to measurement of ship, see *The Petrel*, (1893) P. 320, and other cases cited *ante*, p. 475. By sect. 503 (3), the owner of every sea-going ship is liable for loss or damage arising on distinct occasions as if no other loss had arisen. See *The Schwan*, (1892) P. 419, C. A., and other cases cited *ante*, p. 475. The limitation of liability fixed by sect. 503, *supra*, is extended by 63 & 64 V. c. 32, s. 1, to where without the actual fault or privity of the owners "any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or moveable by reason of the improper navigation or management of the ship." Charterers by demise are not "owners" within the above sections. *The Hopper No. 66*, (1906) P. 34.

Sect. 508, *ante*, p. 475, reserves the liability of a master or seaman, as such, though he may also be an owner, and provides that the above limitation shall extend to such British ships only as are recognized as such, *i.e.*, are registered [sect. 2 (2)], except in the case of certain ships under 15 and 30 tons respectively (sect. 3). It does not apply to a launch, although she could not be registered. *The Andalusian*, 3 P. D. 182.

By the J. Act, 1873, s. 25 (9), "In any cause or proceeding, for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules, hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail." The Admiralty Court in such case, awarded to the plaintiff's ship, a moiety of the damage she had sustained, and in the

case of cross actions, each ship recovered a moiety of the damage she had sustained. *The Milan*, Lush, 398; 31 L. J., P. M. & Ad. 105; *The Hochung* and *The Lapwing*, 7 Ap. Ca. 512, J. C. Where, however, the collision might have been avoided, if a sufficient look-out had been kept, the vessel to blame in this respect, had no claim on the other. *The Milan*, *supra*. Where both ships A. & B. are in fault and jointly do damage to a third ship C., whose owner sues and recovers damages against ship A. only, those damages are to be taken in account in adjusting the damages as between ships A. & B. *The Frankland*, (1901) P. 161.

This principle applies even where one ship is deemed to be in fault by reason of sect. 419 (4), *ante*, p. 783. *The Hibernia*, 31 L. T. 805; 2 Asp. Mar. Cas. 454; J. C., Dec. 1874. Where both ships, A. and B., are to blame, but A. was in charge of a pilot compulsorily employed, and there was no negligence on the part of the crew of A., the owner of A. may recover a moiety of the damage sustained by her without deduction for damage sustained by B. *The Hector*, 8 P. D. 218, C. A.

On the application of J. Act, 1873, s. 25 (9), where damage has been done to cargo by collision with a ship belonging to the owners of the carrying ship, both ships being to blame, see *Chartered Mercantile Bank of India v. Netherlands India Steam Nav. Co.*, 10 Q. B. D. 521, C. A.

Sect 25 (9) does not apply to an action under the Fatal Accidents Act, 1846, 9 & 10 Vict. c. 93, *post*, p. 810, as there was no Admiralty rule relating thereto. *The Bernina* (2), 12 P. D. 58, C. A.; 13 Ap. Ca. 1, D. P.

The M. Ship Act, 1894, s. 620, provides, that a qualified pilot, who has executed a bond for 100*l.*, as required by sect. 619 (ii.), "shall not be liable for neglect, or want of skill, beyond the penalty of the bond and the amount payable to him, on account of pilotage, in respect of the voyage, in which he was engaged when he became so liable."

In the Admiralty Division, interest is always allowed on damages from the time they accrued until payment. *The Gertrude* and *The Baron Aberdare*, 13 P. D. 105, C. A. Even when the action has, after verdict, been transferred from the Queen's Bench to the Admiralty Division for the assessment of damages. S. C. The interest is not limited to six years. *The Kong Magnus*, (1891) P. 223."

A defendant in a collision case is not entitled to deduct from the damages, money paid to the plaintiff by insurers, for the same damage, for the plaintiff is suing for the benefit of the insurers. *Yates v. Whyte*, 4 N. C. 272. *Accord. Simpson v. Thomson*, 3 Ap. Ca. 279, D. P. See *Dickenson v. Jardine*; *N. of England Insur. Assoc. v. Armstrong*; and other cases cited *ante*, p. 449*d*; see also, *ante*, p. 782.

Where the collision caused the loss of the ship's equipment for navigation, and by reason thereof, and without any default on the part of the master or crew, she subsequently grounded and was necessarily abandoned, the loss of the ship was held to be recoverable. *The City of Lincoln*, 15 P. D. 15, C. A. As to damages arising from detention of the plaintiff's vessel, resulting from the collision, see *The City of Peking*, 15 Ap. Ca. 438, J. C., explained in *The Mediana*, *infra*. Damages for loss of charterparty are not too remote, either in the case of a partial loss; *The Star of India*, 1 P. D. 466; *The Consett*, 5 P. D. 229; see also *The Argentine*, 14 Ap. Ca. 519, D. P., or of a total loss; *The Kate*, (1899) P. 165; *The Racine*, (1906) P. 273, C. A. Damages for loss of market by detention of ship A., by collision with ship B., are too remote to be recovered against B., by the owner of cargo in A. *The Notting Hill*, 9 P. D. 105, C. A. Harbour trustees may recover substantial damages for loss of the use of their dredger; *The Greta Holme*, (1897) A. C. 596, D. P.; or lightship; *The Mediana*, (1900) A. C. 113, D. P., injured by collision. As to the measure of such damages see *The Marpessa*, (1906) P. 14, 95, C. A.;

(1907) W. N. 136, D. P. As to the apportionment of the costs of repair of a ship M. as between ships C. and H. which successively caused damage to M., see *The Haversham Grange*, (1905) P. 307, C. A.

Costs.] In the Admiralty Division, where the defendant succeeded on a defence that the negligence was that of a pilot, compulsorily employed, he was not allowed his costs. *The Duoiz*, 47 L. J., P. D. & A. 1, C. A.; *The Matthew Cay*, 5 P. D. 49; and see *The Rigborgs Minde*, *infra*, and *The Bristol City*, (1902) P. 10, 17. So, where both ships were to blame; *The Rigborgs Minde*, 8 P. D. 136, C. A.; *The Hector*, *Id.* 218, C. A.; even where the action was by the owner of cargo carried on ship A., against the owner of ship B., for damage caused by collision. *The City of Manchester*, 5 P. D. 221, C. A. This practice as to costs did not, however, prevail in any other division. *General S. Navigation Co. v. L. & Edinburgh Shipping Co.*, 2 Ex. D. 467. It formerly applied in general where the defence was inevitable accident. *The Marpesia*, L. R., 4 P. C. 212. But the practice in the Adm. D. is now in this case the same as in the other Divisions. *The Monkseaton*, 14 P. D. 51, C. A.; *The Batavier*, 15 P. D. 37, C. A.

Where the County Court has jurisdiction under 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, the Adm. D. seems in its discretion to disallow costs in the absence of special circumstances. *The Asia*, (1891) P. 121; *The Zeta*, *Id.* 216; [affirm. as to jurisdiction of County Court, (1893) A. C. 468], notwithstanding the repeal of 31 & 32 Vict. c. 71, s. 9, *vide ante*, p. 303. But this principle is not followed in the Q. B. D. *Rockett v. Clippingdale*, (1891) 2 Q. B. 293, C. A. As to jurisdiction of the County Courts, see *The County of Durham*, (1891) P. 1; *R. v. City of London Court, Judge of*, (1892) 1 Q. B. 273, C. A.; *Pugsley v. Hopkins*, (1892) 2 Q. B. 184, C. A.

Negligent keeping of Animals.

The owner of an animal, which is ordinarily vicious, as a lion or a bear, is liable generally, for its acts of ferocity, for he is bound to keep it secure, at his peril; but the owner of a domestic animal, as an ox or a dog, is only liable, if he know that the animal is accustomed to do mischief. *R. v. Huggins*, 2 Ld. Raym. 1583; B. N. P. 76; *Jenkins v. Turner*, 1 Ld. Raym. 110. Unless the animal be shown to be harmless, either by its very nature, or to belong to a class that has become so by domestication, it is immaterial whether the individual animal, *e.g.*, an elephant, which has done the injury was a dangerous one, or whether the defendants had any knowledge that it was so, for he is bound to keep it safe at his peril. *Filburn v. People's Palace and Aquarium Co.*, 25 Q. B. D. 258, C. A. In the case of domestic animals, the owner must keep them safe if he have knowledge of their mischievous propensity, and negligence is presumed. *May v. Burdett*, 9 Q. B. 101; *Jackson v. Smithson*, 15 M. & W. 563; *Cox v. Burbidge*, *post*, p. 790. See also *Fletcher v. Rylands*, L. R., 1 Ex. 265, 281.

In an action for keeping a dog, which bit the plaintiff, it is sufficient to show that the dog was, to the defendant's knowledge, of a fierce and savage nature, and had on former occasions evinced an inclination to bite mankind; *Worth v. Gilling*, L. R., 2 C. P. 1, 3; *Barnes v. Lucile*, 23 T. L. R. 389, Mar. 20th, 1907; under such circumstances as would not provoke a dog of good temper. *Charlwood v. Greig*, 3 Car. & K. 46, *cor.* Cresswell, J. It is not necessary to prove that the dog had previously actually bitten any person. *Worth v. Gilling*, and *Barnes v. Lucile*, *supra*. The defendant's knowledge would be evidenced by his having warned a person to beware of the dog lest he should be bitten. *Judge v. Cox*, 1 Stark. 285. It is not sufficient that the defendant knew that the dog had bitten a goat. *Osborne v. Chocquet*, (1896) 2 Q. B. 109. An offer, to make satisfaction to the plaintiff, was held to be evidence, though slight, of

the defendant's knowledge of the habits of the animal. *Thomas v. Morgan*, 2 C. M. & R. 496. Where the defendants have done all that is reasonable to get rid of a stray dog which has come on their premises, they are not liable for injury it may do. *Smith v. Gt. E. Ry. Co.*, L. R., 2 C. P. 4. Where the defendant was a milkman, and his wife occasionally attended to his business, carried on in the premises, where he kept the dog, it was held that a complaint that the dog had bitten a person, made to the wife on the premises, to be communicated to the husband, was evidence of *scienter*. *Gladman v. Johnson*, 36 L. J., C. P. 153. So, where complaint was made to two men, serving customers, behind the bar of the defendant's public-house, out of which the dog had come. *Applebee v. Percy*, L. R., 9 C. P. 647. Knowledge by a servant, who has charge of a dog, of its mischievous propensities, is equivalent to knowledge of the master. *Baldwin v. Casella*, L. R., 7 Ex. 325.

Where the plaintiff was injured by a bull, driven in a highway, and there was evidence that the owner knew this bull would run at anything red, and the plaintiff wore a red handkerchief, this was held evidence that the owner knew of the bull's mischievous nature. *Hudson v. Roberts*, 6 Exch. 697; 20 L. J., Ex. 299. A horse, straying on the high road, kicked a child; there was no proof that the horse was of a vicious temper, or how he came to get loose; it was held that the evidence was not sufficient to support an action for the injury to the child. *Cox v. Burbidge*, 13 C. B., N. S., 430; 32 L. J., C. P. 89. The court, in this case, seemed to think that whether the horse strayed on to the road, by reason of the negligence of the owner or not, was immaterial, because, even supposing that there was negligence in this respect, the owner would only be liable for the ordinary consequences of his neglect, and that the horse kicking the child, was not a consequence of that nature. But, in *Lee v. Riley*, 18 C. B., N. S. 722; 34 L. J., C. P. 212, where, through the defect of a gate, which the defendant was bound to repair, the defendant's horse strayed into a field, belonging to the plaintiff, and kicked the plaintiff's horse, it was held, that the plaintiff was entitled to recover, as the damage resulted from a trespass for which the defendant was responsible. *Accord. Ellis v. Loftus Iron Co.*, L. R., 10 C. P. 10, and see *Smith v. Cook*, 1 Q. B. D. 79. As to damage, caused by animals straying, through neglect of railway company to fence their line, as required by the 8 & 9 V. c. 20, s. 68, *post*, p. 795, see *Child v. Hearn*, L. R., 9 Ex. 176; *Wiseman v. Booker*, 3 C. P. D. 184, cited *post*, p. 795.

If a dog, accustomed to bite, be let loose at night, for the protection of the defendant's yard, and the injury arise from the plaintiff incautiously going into the yard, after it has been shut up, no action will lie. *Brock v. Copeland*, 1 Esp. 203; *Deane v. Clayton*, 1 B. Moo. 225, 245. But, though a person has a right to keep a fierce dog to protect his property, he must not place it in the open approaches to his house, so as to injure persons lawfully coming to his house; *per Tindal, C.J., Sarch v. Blackburn*, M. & M. 505; see also *Blackman v. Simmons*, 3 C. & P. 138. The principle of these cases was discussed in *Bird v. Holbrook*, 4 Bing. 628, where it was held, that the defendant, who, for the protection of his property, had set a spring-gun, without notice, in a walled garden, was answerable in damages to a person who, having climbed over the wall, in search of a stray fowl, was injured by the gun. On this case, see *Lynch v. Nurdin*, 1 Q. B. 29, 37; *Jordin v. Crump*, 8 M. & W. 782; *Burnes v. Ward*, 9 C. B. 392, 421; 19 L. J., C. P. 195; *Degg v. Midland Ry. Co.*, 1 H. & N. 773; 26 L. J., Ex. 171. In *Stiles v. Cardiff S. Navigation Co.*, 33 L. J., Q. B. 310, where the plaintiff entered a stable-yard, belonging to the defendants, to make inquiries from their servants, about his luggage, which was in the custody of the defendants, and was bitten by a dog, chained up in a corner of the yard, it was held that there was evidence of negligence. In *Line v. Taylor*, 3 F. & F. 731, the dog

was allowed to be brought into court, and inspected by the jury, that they might judge of its disposition.

In the case of injury by a dog, to cattle, the Dogs Act, 1906, 6 E. 7, c. 32, s. 1 (replacing 28 & 29 V. c. 60), s. 1 (1), renders evidence of a previous mischievous propensity of the dog, or of the owner's knowledge thereof, or of negligence on his part, unnecessary. By sect. 1 (2), the occupier of any house or premises, where the dog was kept, or permitted to live, or remain, at the time of the injury, shall be presumed to be the owner of the dog, and shall be liable for the injury, unless he proves that he was not the owner of the dog at that time: provided, that where there are more occupiers than one, in any house, &c., let in separate apartments, or lodgings, or otherwise, the occupier of that particular part of the house, &c., in which the dog has been kept, &c., at the time of the injury, shall be presumed to be the owner of the dog. By sect. 7, "the expression 'cattle' includes horses, mules, asses, sheep, goats, and swine."

As to the defendant's liability for the trespasses of his domestic animals on the land of another, *vide sub tit., Trespass to land—Evidence of trespass committed by defendant, post*, p. 937; and for injury caused by their straying on the highway, see *Hudwell v. Righton*, (1907) 2 K. B. 345.

Negligent User of Land.

Many of the cases, sometimes classed under this head, will be found under *Nuisance, ante*, pp. 759 *et seq.*, and *Disturbance of support of land, post*, pp. 812 *et seq.* The following are miscellaneous cases of injury, arising from the negligent user of land, which do not fall within the above heads.

As to the liability of contiguous mine owners, it has been held that the owner of a colliery, lying on a higher level than another, belonging to the plaintiff, may, so long as he does not work in an unusual and negligent manner, remove coal from his mine, so that water flows into that of the plaintiff. *Smith v. Kenrick*, 7 C. B. 515; *Wilson v. Waddell*, 2 Ap. Ca. 94, D. P., and see *Smith v. Fletcher, Id.*, 781, and *W. Cumberland Iron, &c. Co. v. Kenyon*, 11 Ch. D. 782, C. A. The owner of the upper, of two adjoining mines, is not liable for injury, by water flowing by gravitation, into the lower mine, from works conducted by him, in the usual and proper manner; but he has no right to take active measures, to discharge water from the upper, into the lower mine. *Baird v. Williamson*, 15 C. R., N. S. 376; 33 L. J., C. P. 101. *Accord. Young v. Bankier Distillery Co.*, (1893) A. C. 691, D. P. See also *Crompton v. Lea*, L. R., 19 Eq. 115; *Smith v. Fletcher, supra*. So, if a landowner, A., bring water on to his land, by artificial means, he is bound at his peril to keep it from escaping, and causing injury on his neighbour's land. *Fletcher v. Rylands*, 3 H. L. 330. And, even if it come there by natural causes, A. must not take active steps to transfer the injury to his neighbour, B., by discharging it on B.'s land. *Whalley v. Lancashire and York Ry. Co.*, 13 Q. B. D. 131, C. A. A. may, however, prevent the water from coming on his land, although the water goes in consequence on B.'s land, and causes injury to B. *Nield v. L. & N. W. Ry. Co.*, L. R. 10 Ex. 4. As to damages recoverable for flooding a mine, see *Smith v. Fletcher*, L. R., 7 Ex. 305, 313. No objection was taken to the rule of damages, here laid down. *Vide S. C.*, L. R., 9 Ex. 64, Ex. Ch., and 2 Ap. Ca. 781, D. P. Where the defendant has used all reasonable care to prevent water stored on his land from escaping, he is not liable for damage, caused by an escape, the consequence of *vis major*. *Nichols v. Marsland*, L. R., 10 Ex. 255; 2 Ex. D. 1, C. A. See also *Box v. Jubb*, 4 Ex. D. 76. The application of the above principles, to the rights and

liability of the occupiers of different floors, or flats in the same building, was considered in *Carstairs v. Taylor*, L. R., 6 Ex. 217, and *Ross v. Fedden*, L. R. 7 Q. B. 661; and as between such occupiers and the owners of the whole house in *Blake v. Woolf*, (1898) 2 Q. B. 426, and *Hargroves, &c. v. Hartopp*, (1905) 1 K. B. 472, *ante*, p. 742. As to defendant's liability, for injury caused by the flooding of his neighbour's land, by reason of defendant's negligence, in maintaining a river wall, see *Nitrophosphate, &c. Manure Co. v. L. & S. Katherine's Dock Co.*, 9 Ch. D. 503, and *Buckley v. Buckley*, (1898) 2 Q. B. 608, C. A. The principle of *Fletcher v. Rylands*, *ante*, p. 791, extends to the discharge into the earth of an electric current created by the defendant, causing injury to the plaintiff or the ordinary use of his property. See *National Telephone Co. v. Baker*, (1893) 2 Ch. 186; *E. & S. African Telegraph Co. v. Cape Town Tramways Co.*, (1902) A. C. 381, J. C.

No action lies, where the damage results, from carrying out works, &c., authorized by statute; *Dixon v. Metropolitan Board of Works*, 7 Q. B. D. 418, and see further cases cited *post*, p. 793; nor where they are carried out under a provisional order of the Board of Trade, the granting of which is so authorized. *National Telephone Co. v. Baker*, *supra*. As to damages recoverable, for injury, caused by commissioners negligently carrying out works, they are bound to do, *Collins v. Middle Level Commissioners*, L. R., 4 C. P. 279. See also *Goddiss v. Bann Reservoir Co.*, 3 Ap. Ca. 430, D. P.

As to the liability of a wharf owner, for injury caused by the state of the river bed adjacent to his wharf, to a ship, which he invited to discharge there, see *The Moorcock*, and *The Bearn*, *post*, p. 800; *The Calliope*, (1891) A. C. 11, D. P.; *Wright v. Lethbridge*, 63 L. T. 572, M. Sit., 1891, C. A. See also *Bede SS. Co. v. R. Wear Comrs.*, (1907) 1 K. B. 310, C. A.

Negligent keeping of Fire, or Inflammable Matter.

By the Building Act, 14 G. 3, c. 78, s. 86, "no action" will lie against "any person, in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall" . . . "accidentally begin." This section is of general application, and not confined to the metropolis. *Filliter v. Phippard*, 11 Q. B. 347. It does not apply to cases of negligence, or of fires intentionally lighted; and if a fire be negligently lighted or kept by a person, or his servant, on his premises, so that it sets fire to his neighbour's premises, he is liable to his neighbour. S. C., commenting on 1 Bl. Com. 431. See also *Canterbury, Vt. v. A.-G.*, 1 Phil. 306. It seems that the effect of the statute, is to rebut the presumption, that the happening of the fire was the result of negligence.

In *Vaughan v. Menlove*, 7 C. & P. 525, where the defendant was held liable, for damage occasioned to plaintiff's property, from the defendant's hayrick having ignited, by reason of its being carelessly put together, Patteson, J., directed the jury to consider, whether the defendant had acted, as a man of ordinary skill and prudence would have acted, or whether, through his negligence and carelessness, the plaintiff's property had been consumed. It was not enough that the defendant had acted *bonâ fide*; for if, by want of judgment or care, the injury had been occasioned, he was liable to the action. S. C., 3 N. C. 468. In an action against a railway company, for so negligently managing an engine, that the plaintiff's premises were burnt, by the sparks emitted from it, it appeared in evidence, that the danger, from emission of sparks, might be diminished, but it was not shown that the company had taken any precautions, for that purpose. It was held that there was a *prima facie* case of negligence. *Piggot v. E. Counties Ry.*

Co., 3 C. B. 229. In such case, where it is a question whether the sparks could have reached the premises at a distance from the rail, evidence is admissible to show that sparks had been in fact thrown as far by other engines. S. C. It was also there held, that the mere act of ignition, by the sparks, was *prima facie* evidence of negligence, and called for proof of reasonable precautions. S. C. Where the defendants left heaps of hedge trimmings, near their line, in dry weather, so that they became ignited, by sparks from a passing engine, and did damage, this was held to be evidence of negligence. *Smith v. L. & S. W. Ry. Co.*, L. R., 5 C. P. 98: L. R., 6 C. P. 14, Ex. Ch. In one case it was said, that the defendants might show that the plaintiff negligently placed his stack, or rick, so as to expose it to danger. *Semb. per Tindal, C.J., in Aldridge v. Gt. W. Ry. Co.*, 3 M. & Gr. 515.

A railway company is not, apart from the provisions of Stat. 5 E. 7, c. 11, *infra*, responsible for these accidental fires if they have taken every precaution, that science can suggest, to prevent injury; they are only liable, if guilty of some negligence in fact, and negligence cannot be implied, from the mere employment of locomotives, where the use of them has been expressly permitted by the legislature. *Vaughan v. Taff Vale Ry. Co.*, 5 H. & N. 679; 29 L. J., Ex. 247, Ex. Ch., following *R. v. Pease*, 4 B. & Ad. 30. *Accord. Hammersmith & City Ry. Co. v. Brand*, L. R., 4 H. L. 171; *L. Brighton & S. C. Ry. Co. v. Truman*, 11 Ap. Ca. 45, D. P. Where the plaintiff proved that the engine was not provided with the ordinary appliances for preventing sparks issuing from the fire-box, but the defendants called scientific witnesses, to show that the engine was so constructed as to make it unnecessary to provide any of these safeguards; it was held to have been rightly left to the jury, whether there had been negligence, in the condition of the engine, or in the manner of working it. *Freemantle v. L. & N. W. Ry. Co.*, 10 C. B., N. S. 89; 31 L. J., C. P. 12. See also *Dimmock v. N. Staffordshire Ry. Co.*, 4 F. & F. 1058.

By the Railway Fires Act, 1905, 5 E. 7, c. 11, ss. 1 (1), 5, where, 'after Dec. 31st, 1907, "damage is caused to agricultural land or to agricultural crops as in this act defined by fire arising from sparks or cinders emitted from any locomotive engine used on a railway, the fact that the engine was used under statutory powers shall not affect liability in an action for such damage," unless, sect. 1 (3), the claim for damages exceeds 100/. By sect. 1 (2), "Where any such damage has been caused through the use of an engine by one company on a railway worked by another company, either company shall be liable in such an action; but if the action is brought against the company working the railway, that company shall be entitled to be indemnified in respect of their liability by the company by whom the engine was used." By sect. 4. "The expression 'agricultural land' includes arable and meadow land and ground used for pastoral purposes or for market or nursery gardens, and plantations and woods and orchards, and also includes any fences on such land, but does not include any moorland or buildings. The expression 'agricultural crops' includes any crops on agricultural land, whether growing or severed, which are not led or stacked. The expression 'railway' includes any light railway and any tramway worked by steam power." And where the legislature has not authorized the company to use locomotive engines they are liable for such accidental fires. *Jones v. Festiniog Ry. Co.*, L. R., 3 Q. B. 733. See also *Metrop. Asylum District v. Hill*, 6 Ap. Ca. 193, D. P. So, where locomotive engines are used on ordinary highways, the persons using them are liable for any fires thereby caused, for the statutes which regulate their use expressly reserve the right of action for any injury such locomotives may cause; see 24 & 25 V. c. 70, s. 13; 28 & 29 V. c. 83, s. 12. *Powell v. Full*, 5 Q. B. D. 597, C. A. These

sections are not affected by stat. 61 & 62 V. c. 29. *A.-G. v. Scott*, (1904) 1 K. B. 404, C. A.; (1905) 2 K. B. 160, C. A.

Where an accident occurred by the escape of gas, supplied by a gas company, in a private house, and the only means of shutting off the gas was by a key to a stop-cock in the house, kept by the tenant; it was held, first, that there was no common law obligation on the company, to prevent the gas from escaping, by attaching an external stop-cock, even after the tenant had left the premises, and given notice that no further supply was wanted; secondly, that the negligence of the plaintiff, the owner of the house, in not shutting off the gas, was an answer to an action against the company. *Holden v. Liverpool Gas Co.*, 3 C. B. 1. As to the liability of a gas company, for an explosion, caused by the escape of gas, from a defective service pipe supplied by them, see *Burrows v. March Gas Co.*, L. R., 5 Ex. 67; L. R., 7 Ex. 96, Ex. Ch. See also *Parry v. Smith*, 4 C. P. D. 325, *post*, p. 800.

The defendant is not entitled to deduct from the damage sustained, money received by the plaintiff for the same damage, under a fire policy. *Vide ante*, pp. 443, 458.

An insurer has no right, apart from the assured A., to maintain an action for damage to the thing insured; he can enforce A.'s rights only in A.'s name; *Simpson v. Thomson*, 3 Ap. Ca. 279, D. P.; *Midland Insur. Co. v. Smith*, 6 Q. B. D. 561; and after admitting the claim on the policy. S. C.

Negligence of Railway Companies.

The cases, relating to accidents, caused by the negligent driving of trains, will be found *ante*, pp. 774 *et seq.*; and those occasioned by fire, from their locomotives, *ante*, p. 792. Under the present head are collected cases, decided on the statutory obligation of railway companies, to protect their line with fences, gates, &c.; and on their duty to provide safe platforms, &c., on which their passengers may alight; and also some other cases, with respect to the negligence of their servants.

The obligation to fence, &c., arises under the Railway Clauses Consolidation Act, 1845 (8 & 9 V. c. 20), which, by sect. 47, imposes on the company the duty, where a public road crosses the line of railway at a level, of maintaining "sufficient gates of such dimensions and so constructed as when closed to fence in the railway and prevent cattle or horses passing along the road from entering upon the railway," and of keeping the gates closed, across the road, except when carriages, &c., have to cross the railway. Under this provision, the company are liable for injury even to stray cattle on the road, that had got upon the railway, owing to defect in the repair of swing foot gates at the side of the carriage gates closed across the road; *Charman v. S. E. Ry. Co.*, 21 Q. B. D. 524, C. A.; or through gates improperly left open. *Fawcett v. York, &c. Ry. Co.*, 16 Q. B. 610; 20 L. J., Q. B. 222, decided on 5 & 6 V. c. 55, s. 10, which was to the same effect. The above section obliges the company also to use due care in opening the gates, and allowing carriages to pass. *Lunt v. L. & N. W. Ry. Co.*, L. R., 1 Q. B. 277. Where the carriage gates are left open, this amounts to an intimation that the road across the line is safe; and the company are liable to a foot passenger, who is thereby induced to cross the line, and is hurt by a passing train. *Stapley v. L. Brighton & S. C. Ry. Co.*, L. R., 1 Ex. 21; *Wanless v. N. E. Ry. Co.*, L. R., 6 Q. B. 481, Ex. Ch.; L. R., 7 H. L. 12. If, however, there be no servant of the company at the gate to open it, and the person wishing to cross the railway open the gate himself, he does so at his peril. *Wyatt v. Gl. W. Ry. Co.*, 6 B. & S. 709; 34 L. J., Q. B. 204.

See also on this section, *Matson v. Baird*, 3 Ap. Ca. 1082, D. P. The Highway Act, 1835 (5 & 6 W. 4), c. 50, s. 71, contains a somewhat similar provision.

A footpath, entered by swing gates, crossed a railway on a curve, at a short distance from a bridge, which partially obstructed the view of trains; the plaintiff, who was deaf of one ear, was injured by a down train, while his attention was attracted by the passing of an up train; it was held that there was evidence of negligence by the company. *Bilbee v. L. & Brighton Ry. Co.*, 18 C. B., N. S. 584; 34 L. J., C. P. 182. This case has been explained, on the ground that the company, having constructed a peculiarly dangerous crossing, were bound to take special precautions. *Cliff v. Midland Ry. Co.*, L. R., 5 Q. B. 258, 263—265. There is, however, no general duty on railway companies to place watchmen at public footways crossing the railway at a level; but it depends on the circumstances of each case, whether the omission of such a precaution amounts to negligence on the part of the company. S. C.; *Stabley v. L. & N. W. Ry. Co.*, L. R., 1 Ex. 13; *Skelton v. L. & N. W. Ry. Co.*, L. R., 2 C. P. 631; *James v. Gt. W. Ry. Co.*, L. R., 2 C. P. 634, n.; *Ellis v. Gt. W. Ry. Co.*, L. R., 9 C. P. 551, Ex. Ch.; *Davey v. L. & S. W. Ry. Co.*, 11 Q. B. D. 213; 12 *Id.* 72, C. A. See also *Slattery v. Dublin, Wicklow, &c. Ry. Co.*, 3 Ap. Ca. 1155, D. P.; *Wakelin v. L. & S. W. Ry. Co.*, (1896) 1 Q. B. 189, n., C. A.; 12 Ap. Ca. 41, D. P.; *Smith v. S. E. Ry. Co.*, *Id.* 178, C. A. It is no evidence of negligence, that the company has not exercised a statutory power, of diverting the way across the line. *Cliff v. Midland Ry. Co.*, *supra*. Where an engine ran over the plaintiff, a child three years old, it not appearing how the child got on the line, or that there was negligence on the part of the company, the plaintiff was nonsuited. *Singleton v. E. Counties Ry. Co.*, 7 C. B., N. S. 287. But, in a similar case, where it appeared that the absence of a gate, or stile, where a road, or path, crossed the line, as required by sects. 47, 61, might have been the cause of the accident, the plaintiff was held to be entitled to recover. *Williams v. Gt. W. Ry. Co.*, L. R., 9 Ex. 157.

As to the duty of the company, with respect to the state of the line, at a level crossing, *vide ante*, p. 794.

Under 8 & 9 V. c. 20, s. 68, a railway company is bound to maintain sufficient fences for separating the land, taken for the use of the railway, from adjoining lands not taken, and protecting the cattle of the owners and occupiers from straying thereout. This obligation is absolute, and is not affected by sect. 73. *Dixon v. Gt. W. Ry. Co.*, (1897) 1 Q. B. 300, C. A. If the company neglect to fence, neither it, nor its servants, can recover for injury caused by animals straying on its land; *Child v. Hearn*, L. R., 9 Ex. 176; nor can the tenants of the land. *Wiseman v. Booker*, 3 C. P. D. 184. The plaintiff's sheep escaped into the field of A. from defect of fences, which the plaintiff was bound to repair, and thence into a railway, by reason of a defect in the railway fences: held, that the plaintiff could not sue the railway company for injury to his sheep by a train. *Ricketts v. E. & W. India Docks, &c. Ry. Co.*, 12 C. B. 160; 21 L. J., C. P. 201. So, where the plaintiff's cattle strayed from his own field, into the highway, and thence, through a defective fence of the company, on to the railway, and were there killed by a train, it was held, that the section did not oblige the company to fence against any but persons lawfully on the highway, and that they were not liable. *Manchester, &c. Ry. Co. v. Wallis*, 14 C. B. 213; 23 L. J., C. P. 85; *Luscombe v. Gt. W. Ry. Co.*, (1899) 2 Q. B. 313. So, if the owner of lands, adjacent to a railway, have a key of a gate to a private crossing over it, and the gate be left open by him, the company is not liable for injury to his cattle straying on the rail, even if

there be some negligence in the company; and the owner cannot, under such circumstances, set up the objection, that the defendant ought to have made a bridge, and not a level crossing. *Ellis v. L. & S. W. Ry. Co.*, 2 H. & N. 424; 26 L. J., Ex. 349. The obligation to fence, created by the above section, applies only as between the railway company, and the adjoining landowner, or his licensee; as between the company and their passengers the company are only, under their common law liability, to take every reasonable care to prevent cattle straying on their line. *Buxton v. N. E. Ry. Co.*, L. R., 3 Q. B. 549. A person using the lands of the adjoining owner, by his permission, is in the same position as he is. *Dawson v. Midland Ry. Co.*, L. R., 8 Ex. 8. As to the right of the occupier, under sect. 68, to have the land fenced by the railway company, when the owner has released his right, see *Corry v. Gt. W. Ry. Co.*, 7 Q. B. D. 322, C. A.

The liability of railway companies in respect of negligence, in providing at their stations safe means of alighting from their carriages, has been discussed in numerous cases. "The company are bound to use reasonable care in providing accommodation for passengers, and the passengers also are bound to use reasonable care in availing themselves of the accommodation provided for them." *Per Cockburn, C.J.*, in *Praeger v. Bristol & Exeter Ry. Co.*, 24 L. T. 107, cited L. R., 7 C. P. 324. Where the company require a passenger to alight, without affording reasonable facilities for the purpose, they are liable if the passenger, through no default of his own, meet with an accident in alighting. *Foy v. L. B. & S. C. Ry. Co.*, 18 C. B., N. S. 225. Where the carriage, in which the plaintiff is travelling, is drawn up beyond the platform owing to the length of the train, or other cause, and the danger is visible, and there has been no invitation to alight, the company are not liable for injury caused to the plaintiff by his jumping down. *Siner v. Gt. W. Ry. Co.*, L. R., 3 Ex. 150; Ex. Ch., L. R., 4 Ex. 117. But, if there were an invitation to alight, the company would be liable. *Robson v. N. E. Ry. Co.*, L. R., 10 Q. B. 271; 2 Q. B. D. 85, C. A., and *Rose v. Id.*, 2 Ex. D. 248, C. A. And where the danger is in the nature of a trap, not being visible from the darkness, or other cause, and unknown to the plaintiff, the company will be liable if he injure himself, in alighting at their invitation. *Cockle v. S. E. Ry. Co.*, L. R., 7 C. P. 321, Ex. Ch., following *Praeger v. Bristol & Exeter Ry. Co.*, 24 L. T. 105, Ex. Ch., cited L. R., 7 C. P. 323; *Bridges v. N. London Ry. Co.*, L. R., 7 H. L. 213. The invitation in *Praeger v. Bristol & Exeter Ry. Co.*, *supra*, was the opening the carriage door, and in *Cockle v. S. E. Ry. Co.*, and *Robson v. N. E. Ry. Co.*, *supra*, the bringing the train to a final standstill, for the purpose of the passengers alighting. See also *Petty v. Gt. W. Ry. Co.*, L. R., 5 C. P. 461, n.; and *Whittaker v. Manchester & Sheffield Ry. Co.*, *Id.* 464, n. Whether calling out the name of the station, by the defendant's servants, on the platform, amounts to an invitation, depends on the circumstances of each case; calling it out before the train arrives at a standstill at the station is not such an invitation; *Lewis v. L. Chatham & D. Ry. Co.*, L. R., 9 Q. B. 66; but it is otherwise, where the name is called out, after the train has arrived at a final standstill. *Weller v. L. Brighton & S. C. Ry. Co.*, L. R., 9 C. P. 126; *Bridges v. N. L. Ry. Co.*, *supra*.

So, a railway company are responsible, if they invite their passengers to use an unsafe bridge over their line; *Longmore v. Gt. W. Ry. Co.*, 19 C. B., N. S. 183; 35 L. J., C. P. 135, n.; or if, the usual exit being blocked up, they assent to the passengers leaving a station, by a way across which is an obstruction, unseen, on account of the darkness. *Nicholson v. Lancashire, &c. Ry. Co.*, 3 H. & C. 534; 34 L. J., Ex. 84. So, where the company allow a person, for whom they carry goods by their line, to assist

in unloading them, they are liable for negligence towards him. *Holmes v. N. E. Ry. Co.*, L. R., 4 Ex. 254; Ex. Ch. L. R., 6 Ex. 123; *Wright v. L. & N. W. Ry. Co.*, L. R., 10 Q. B. 298; 1 Q. B. D. 252, C. A. See also *Smith v. L. & S. Katherine's Dock Co.*, L. R., 3 C. P. 326, cited *post*, p. 799; *John v. Bacon*, L. R., 5 C. P. 437; and cases cited *ante*, pp. 764, 765.

But there must be some evidence of negligence, on which the jury may reasonably and properly act, or the judge is bound to direct a verdict for the defendant; and a railway company is not answerable for injury which may happen to a passenger from using a station or a staircase provided by them, if it be reasonably safe for the purpose. *Toomey v. L. Brighton & S. C. Ry. Co.*, 3 C. B., N. S. 146; 27 L. J., C. P. 39; *Corrigan v. E. Counties Ry. Co.*, 4 H. & N. 781; 29 L. J., Ex. 94; *Crafter v. Metropolitan Ry. Co.*, L. R., 1 C. P. 300; *Longmore v. Gt. W. Ry. Co.*, *ante*, p. 796. See also *Simkin v. L. & N. W. Ry. Co.*, 21 Q. B. D. 453, C. A., and cases cited *ante*, pp. 777 *et seq.*

Where the door of the defendants' railway carriage, in which the plaintiff was travelling, flew open, owing to some defect in the fastening, and the plaintiff, while the train was in motion, endeavoured to shut the door, and in so doing was thrown out and injured, it was held, that the defendants were not liable. *Adams v. Lancashire, &c. Ry. Co.*, L. R., 4 C. P. 739. This case was decided on the ground that the plaintiff should have suffered the inconvenience, rather than expose himself to considerable peril (see also observations of Bramwell, L.J., in *Lax v. Cor. of Darlington*, 5 Ex. D. 35, 36). In *Gee v. Metropolitan Ry. Co.*, L. R., 8 Q. B. 161, Ex. Ch., the court, while approving the principle, doubted whether it was correctly applied to the facts in *Adams v. Lancashire, &c. Ry. Co.*, *supra*. Where the plaintiff stood up against the door of the railway carriage, in order to look out, and the door flew open, whereby he was thrown out and injured; this was held evidence of negligence on the part of the company. *Gee v. Metropolitan Ry. Co.*, *supra*.

Where the guard of the defendants, a railway company, forcibly closed the door of one of their carriages, without previous warning, so as to crush the hand of the plaintiff, a passenger who was in the act of entering the carriage, between the door and the door-post, it was held, that the jury were justified in finding that the guard was guilty of negligence, and that there was no contributory negligence on the part of the plaintiff. *Fordham v. L. Brighton & S. C. Ry. Co.*, L. R., 3 C. P. 368; Ex. Ch., L. R., 4 C. P. 619; *Coleman v. S. E. Ry. Co.*, 4 H. & C. 699. But, in a similar case, where the plaintiff left his hand on the edge of the door, half a minute after entering the carriage, and the guard gave due warning, before shutting the door, the court held that the accident was attributable solely, to the plaintiff's want of caution, in leaving his hand, after he had entered the carriage, upon a door, that he must have known would be shut immediately. *Richardson v. Metropolitan Ry. Co.*, L. R., 3 C. P. 374, n. See also *Drury v. N. E. Ry. Co.*, (1901) 2 K. B. 322, and *Jackson v. Metropolitan Ry. Co.*, 3 Ap. Ca. 193, D. P.

As to evidence of negligence, arising from insufficiency of the staff of porters, at the station, to regulate the crowd of passengers on the platform, or to remove those over-crowding the carriages, *vide* S. C. The robbery of a passenger C. caused by the over-crowding of the carriage in which C. travelled, is too remote a damage to be recoverable by him. *Cobb v. Gt. W. Ry. Co.*, (1893) 1 Q. B. 459, C. A.; (1894) A. C. 419, D. P. A railway company are not liable for an assault committed on a passenger, P., while travelling on their railway by his fellow passengers, when the company, at the time P. took his ticket, did not know that owing to illwill incurred by P. the assault was probable. *Pounder v. N. E. Ry. Co.*, (1892) 1 Q. B. 355; see also the

preceding case. Nor for injury caused by dangerous goods brought into a railway carriage, unless the company were negligent in permitting them to be brought in. *E. Indian Ry. Co. v. Mukerjee*, (1901) A. C. 396, J. C.

The Regulation of Railways Act, 1868 (31 & 32 V. c. 119), s. 22, which requires that in every train carrying passengers, and travelling more than 20 miles, without stopping, the company shall provide means of communication between the passengers, and servants in charge of the train, applies to every passenger train, intended to travel more than 20 miles without stopping; *Blamires v. Lancashire & Yorkshire Ry. Co.*, L. R., 8 Ex. 283, Ex. Ch., *ante*, p. 778; and the omission to provide such communication, may be evidence of negligence. S. C.

Miscellaneous Cases of Negligence.

Although the mere happening of an accident, is not in general *prima facie* evidence of negligence, and the plaintiff is bound to give some evidence in support of the defendant's negligence; *Cotton v. Wood*, 8 C. B., N. S. 568; 29 L. J., C. P. 333; *Hammack v. White*, 11 C. B., N. S. 588; 31 L. J., C. P. 129, cited *ante*, p. 779; *Smith v. Gt. E. Ry. Co.*, L. R. 2 C. P. 4, 10; *Welfare v. L. Brighton & S. C. Ry. Co.*, L. R., 4 Q. B. 693; yet the accident may be of such a nature, that *res ipsa loquitur*, i.e. negligence must be assumed, from the unexplained fact of the accident happening. Thus, where the plaintiff, while walking in a street, in front of the house of the defendant, a flour dealer, was injured by a barrel of flour falling upon him from an upper window, it was held, that this was evidence to go to the jury. *Byrne v. Boadle*, 2 H. & C. 722; 33 L. J., Ex. 13. So, where a custom-house officer was struck by a bag of sugar, lowered by a crane overhead, while he was lawfully in the docks. *Scott v. London Docks Co.*, 3 H. & C. 596; 34 L. J., Ex. 17, 220, Ex. Ch. So, where a brick fell from a railway bridge, which a train had just crossed, and injured the plaintiff, who was passing along the highway below the bridge, this was held to be *prima facie* evidence of negligence. *Kearney v. L. Brighton & S. C. Ry. Co.*, L. R., 6 Q. B. 759, Ex. Ch. See also *Briggs v. Oliver*, 4 H. & C. 403; 35 L. J., Ex. 163. So where damage was caused by an explosion in the loading machine at which the plaintiff M. was working in the defendant's cartridge works, there being evidence that the machine worked imperfectly, and that M. was not negligent. *McArthur v. Dominion Cartridge Co.*, (1905) A. C. 72, J. C.

Where, however, a person places himself voluntarily in a dangerous place, he is then subject to all the risks of his situation, for the maxim "*Volenti non fit injuria*" applies. See *Membery v. Gt. W. Ry. Co.*, 14 Ap. Ca. 179, 186, 187, *per* Lds. Halsbury, C., and Bramwell. Thus, where A., a stranger, while watching the defendant's workmen, so placed himself, that a loaded bucket used in the work, passed over his head, and the chain which carried it breaking, it fell and killed him, the defendant was held not liable. *Batchelor v. Fortescue*, 11 Q. B. D. 474, C. A. A railway company was held not liable to the plaintiff, the servant of their contractor, for injury occasioned to him by their negligence in the course of his employment on their line, the plaintiff knowing the danger of the employment. *Woodley v. Metropolitan District Ry. Co.*, 2 Ex. D. 384, C. A. This case has been explained on the ground that the plaintiff there had the means of avoiding the danger. See *Thrussell v. Handyside*, 20 Q. B. D. 359, 365, 366. And where in a similar case the plaintiff had no such means, without giving up his employment, and continued it, in obedience to his master's orders, he was held not to be *volens* within the meaning of the maxim, and was entitled to recover. S. C. See *Smith v. Baker*, and other cases cited *post*, p. 801. Where the extent

of the danger is not known, the maxim does not apply. *Osborne v. L. & N. W. Ry. Co.*, 21 Q. B. D. 220.

The defendant sent bales to a warehouse, where they were insecurely piled under the direction of the warehouse-keeper, so that the plaintiff, a servant of the owner of the warehouse, was injured, it was held that the defendant was not liable. *Murphy v. Caralli*, 3 H. & C. 462; 31 L. J., Ex. 14. So, where the defendant employs a stevedore to load his vessel, he is not liable for the negligence of one of his own crew, employed by the stevedore. *Murray v. Currie*, L. R., 6 C. P. 24; *Manning v. Adams*, W. N. 1883, p. 223, Mich. S., Q. B. D. See *Goslin v. Agricultural Hall Co.*, 1 C. P. D. 482, C. A., and *Rourke v. White Moss Colliery Co.*, cited *ante*, p. 776. Where the pauper inmate of a workhouse in assisting, by order of the labour master, in work being carried out therein by the guardians, was injured through the negligence of the workhouse officials engaged in the work, the guardians were held not liable. *Tozeland v. W. Ham Guardians*, (1907) 1 K. B. 920, C. A. As to injury caused to the plaintiff by the negligence of a nurse hired from a nursing association, see *Hall v. Lees*, (1904) 2 K. B. 602 C. A.; or by the want of reasonable care and skill of the visiting physician of a fever hospital in discharging a patient in an infectious state. *Evans v. Liverpool Cor.*, (1906) 1 K. B. 160.

Where the defendants, D., gratuitously let the consignee of heavy goods, use a crane, which broke, and let a stone fall on B., who had voluntarily assisted the consignee to unload, it was held that B. could not sue D., although they knew of the defective state of the crane; for there was no fraud, nor was B. a party to any contract with D. *Semb.* the consignee might have sued defendants, if he had been injured by it. *Blakemore v. Bristol & Exeter Ry. Co.*, 8 E. & B. 1035; 27 L. J., Q. B. 167. So, where the defendant A. having erected a scaffold, in order to pull down a house, employed B. to do some part of the work, and for that purpose gratuitously allowed him the use of the scaffold, which, owing to some defect not known to A., fell, and the plaintiff, one of B.'s workmen, was injured; held that A. was not liable. *MacCarthy v. Young*, 6 H. & N. 329; 30 L. J. Ex., 227. *Accord.* *Coughlin v. Gillison*, (1899) 1 Q. B. 145, C. A. But where a ship was received into A.'s dock, for repairs, and staging was provided by A. for immediate use, for work on the ship, A. was held to be under an obligation, to all persons, who should use the staging for work on the ship, to take reasonable care that at the time the staging was provided, it was in a fit state to be used; the obligation arises from an "invitation," by A., to such persons who use the staging, and for breach of the obligation, they can sue A. *Heaven v. Pender*, 11 Q. B. D. 503, C. A. See also *Marney v. Scott*, (1899) 1 Q. B. 986. So, where a dock company provide gangways from the shore, to the ships lying in their dock, the gangways being under the control of their servants, the company are bound, as against persons having business on board those ships, to keep the gangways reasonably safe. *Smith v. L. & S. Katherine's Dock Co.*, L. R., 3 C. P. 326. See cases cited *ante*, pp. 763 *et seq.* So, where a colliery owner, H., consigned coals to his vendee by rail, in a truck hired by H. of M., which H. had negligently allowed to leave the colliery in a defective state, and E., a servant of the vendee, was in consequence of the defect injured in unloading the coal, H. was held liable to E. *Elliott v. Hall*, 15 Q. B. D. 315. As to the liability of M., see *Caledonian Ry. Co. v. Mulholland*, (1898) A. C. 216, D. P. Where a person erects a stand, to which he admits others, on payment, to view races, &c., the contract between him, and the person admitted, is analogous to the contract between a carrier and passengers, and there is an implied warranty, not only of due care on the part of himself and servants, but also on the part of any independent contractor, who may have been employed by him, to construct

the means of conveyance or support. *Francis v. Cockrell*, L. R., 5 Q. B. 184; Ex. Ch. *Id.* 501. See also *Kiddle v. Lovett*, 16 Q. B. D. 605. Where the defendant for valuable consideration allows a ship, for the purpose of unlading, to lie at his jetty in a tidal river, so that she grounds at each low tide, there is an implied undertaking that he has taken reasonable care to ascertain that the bottom of the river at the jetty was in such a condition as not to endanger the ship. *The Moorecock*, 13 P. D. 157; 14 *Id.* 64, C. A. *Acc. The Bearn*, (1906) p. 48. See also *The Calliope*, and other cases cited, *ante*, p. 792. So, where a dockowner allows a ship to be grounded in his dock for repairs, it is implied that the bottom of the dock is fit for the purpose. *The Apollo*, (1891) A. C. 499, D. P. In such cases, however, stat. 63 & 64 V. c. 32, s. 2, provides a limitation of liability in respect of the damage done to the ship. Where, however, a livery-stable keeper undertakes for reward to receive, and take care of, a carriage of the plaintiff, he is bound only to take reasonable care, that any building in which it is deposited is in a proper state; he does not warrant that it is absolutely safe. *Searle v. Laverick*, L. R., 9 Q. B. 122. See further, as to when warranties are implied by law, *ante*, p. 486.

In *Farrant v. Barnes*, 11 C. B., N. S. 553; 31 L. J., C. P. 137, the defendant sent a carboy of nitric acid to a railway carrier, to be carried; the carboy, after passing through different hands, burst, and injured the plaintiff, who was carrying it; it was held that the defendant was liable, because he had not taken reasonable care, to make the carrier's servants aware of the dangerous character of the acid. So, where a gasfitter, A., negligently fitted a gas-pipe, so that gas escaped, and an explosion occurred, which injured the plaintiff, A. was held liable, on the ground that he was guilty of a breach of duty, in dealing with a thing, in its nature dangerous, without due care. *Parry v. Smith*, 4 C. P. D. 325. Where the plaintiff bought hairwash of the defendant, to be used by the plaintiff's wife, on the representation by the defendant that it was innocuous, and skilfully prepared by him, an action was held to be maintainable by the husband and wife, the wife having been injured by the hairwash, which was negligently prepared by the defendant. *George v. Skirington*, L. R., 3 Ex. 1; and see judgment in *Longmeid v. Holliday*, 6 Exch. 761; 20 L. J., Ex. 430. And on a contract of sale the vendor has "a duty, if there is some dangerous quality in the goods sold, of which he knows, but of which the purchaser cannot be expected to be aware, of taking reasonable precautions in the way of warning the purchaser that special care will be required." *Clarke v. Army & Navy Co-operative Soc.*, (1903) 1 K. B. 155, 164, *per* Collins, M.R. As to damages for breach of duty to recommend a "good stockbroker," see *De la Bere v. Pearson*, (1907) 1 K. B. 483. The principle of the above cases cannot be extended to the giving by the surveyor, G., to a builder, B., of an erroneous certificate as to the progress of buildings being erected by B., so as to make G. liable to B.'s mortgagee, L., for damage sustained by advances being made by M., on the faith of the certificate, there being no contract between L. and G., nor any duty owed by G. to L. to exercise due care in giving his certificate; *Le Lievre v. Gould*, (1893) 1 Q. B. 491, C. A. As to the damages recoverable by the employer against the architect for negligence in preparing plans for him, see *Columbus Co. v. Clowes*, (1903) 1 K. B. 244.

Where a water company were bound to supply water to a house by a main and certain apparatus, and part of the apparatus became inoperative, by reason of a frost of unusual severity, whereby the water overflowed into the lower part of the house, no action was held to lie by the occupier, the apparatus having been sufficient in ordinary winters. *Blyth v. Birmingham Waterworks Co.* 11 Exch. 781; 25 L. J., Ex. 212. See *Harrison v. Gt. N. Ry. Co.*, 3 H. & C. 231; 33 L. J., Ex. 266; and *Nichols v. Marsland*, 2 Ex. D. 1, *ante*, p. 791.

As to an action by B. against a witness for negligently giving false evidence

which caused B.'s conviction. See *Bynoe v. Bank of England*, cited *post*, p. 881.

Negligence of Fellow Servants.

A master, although liable for the negligence of a servant, acting in the course of his employment, is not, at common law, generally responsible for an injury sustained by that servant, owing to the negligence of a fellow servant, engaged with him in a common employment. See cases, *infra*. The Employers' Liability Act, 1880, *post*, p. 804, gives a servant, in certain cases, and under certain restrictions, a right of action against his master, for such negligence. It seems that the most convenient course, is to state the common law on the subject, and afterwards to show how this law has been altered by the statute, *vide post*, pp. 804 *et seq.*

Where one servant overloaded a cart, whereby it broke down, and injured the plaintiff, another servant, it was held that no action lay against the master. *Priestly v. Fowler*, 3 M. & W. 1. So, where a bricklayer's labourer, fell from a scaffold, insufficiently erected by his fellow labourers in the same employment. *Wigmore v. Jay*, 5 Exch. 354. If a stranger volunteer his services, to assist such servants or labourers, and thereby suffer injury from their negligence, the master cannot be sued. *Degg v. Midland Ry. Co.*, 1 H. & N. 773; 26 L. J., Ex. 171; *accord. Potter v. Faulkner*, 1 B. & S. 800; 31 L. J., Q. B. 30, Ex. Ch. But a person who, with the consent of a railway company, assists in unloading goods consigned to him by their line, is not a volunteer within this rule. *Wright v. L. & N. W. Ry. Co.*, L. R., 10 Q. B. 298; 1 Q. B. D. 252, C. A., *ante*, p. 797. The master is not liable to his servant, for an accident happening in the service, in consequence of the alleged inadequacy of the number of servants to assist him in his work. *Skipp v. E. Counties Ry. Co.*, 9 Exch. 223; 23 L. J., Ex. 23. Nor is he liable where the plaintiff, knowing the danger of the work, voluntarily encounters it; for "*Volenti non fit injuria*." *Thomas v. Quartermaine*, 18 Q. B. D. 685, C. A. It has, however, been held that mere continuance at the work, with knowledge of the risk, is not conclusive evidence that it was voluntarily undertaken. *Yarmouth v. France*, 19 Q. B. D. 647; *Smith v. Baker*, (1891) A. C. 325, D. P. Thus where the workman, S., engaged as B.'s servant, in an employment, not in itself dangerous, is exposed to danger, of which he knows, from other work of B., over which S. has no control, whether S. undertook the risk is a question of fact. S. C. In this case the danger arose from the systematic neglect to give S. warning to get out of the way of stones hoisted over his head, one of the stones having fallen on and injured him. So, where the work was dangerous owing to the absence of proper means of access to an elevated tramway. *Williams v. Birmingham, &c. Co.*, (1899) 2 Q. B. 338. See also *Thrussell v. Handyside*, and other cases, cited *ante*, p. 798. As to knowledge of the extent of the danger, see *Osborne v. L. & N. W. Ry. Co.*, cited *ante*, p. 799.

To make a master liable to his servant or workman, there must be personal negligence, or interference of the master, or a special contract. *Ormond v. Holland*, E. B. & E. 102. The negligence of the vice-principal, or representative of the master, will not make the latter liable. *Wilson v. Merry*, L. R., 1 H. L. Sc. 326; *Howells v. Landore Siemen's Steel Co.*, L. R., 10 Q. B. 62. But one of the two co-proprietors of a mine was held liable for the personal negligence of the other. *Ashworth v. Stanwic*, 3 E. & E. 701; 30 L. J., Q. B. 183; *Mellors v. Shaw*, 1 B. & S. 437; 30 L. J., Q. B. 333.

The master is, however, bound to exercise due care and caution in the choice of his servants, otherwise he may become liable in respect of his own negligence, in this respect. *Tarrant v. Webb*, 18 C. B. 787; 25 L. J., C. P., 261; see *Allen v. New Gas Co.*, 1 Ex. D. 251. And he is bound to take all

reasonable precautions, to secure the safety of his workmen. *Brydon v. Stewart*, 2 Macq. 30; *Smith v. Baker*, and *Williams v. Birmingham, &c. Co.*, *ante*, p. 801. Thus, if he provide bad timber for a scaffold, he may be liable. *Roberts v. Smith*, 2 H. & N. 213. So, if he allow the servant, to use a machine, he knowing it to be unsafe and unprotected. *Watling v. Oastler*, L. R. 6 Ex. 73. But the master is not liable, if he did not know it to be in an unsafe state. *Griffiths v. L. & S. Katherine's Dock Co.*, 12 Q. B. D. 493; 13 Q. B. D. 259, C. A. In *Senior v. Ward*, 1 E. & E. 385; 28 L. J., Q. B. 139, one of the defendant's colliers carelessly used a damaged rope, to go down a mine, after being warned to try it first; it was held that defendant, the owner, was not liable for injury caused by the breaking of the rope, although defendant had neglected to try it daily, as he was bound to do, by the rules of the mine; see also observations in *Abraham v. Reynolds*, *post*, p. 803. Plaintiff, a stonemason, in the defendant's mill, which had been built a year before under the superintendence of their clerk, was injured by an accident, owing to the weakness of its foundations: it was held that in the absence of personal negligence of the defendants, or of some person acting as their servant, or by their orders, either in having given directions how the buildings should be constructed, or in having knowingly entrusted the execution of the work to an incompetent workman, the defendants were not liable. *Brown v. Accrington Cotton Spinning Co.*, 3 H. & C. 511; 34 L. J., Ex. 208. See further, *Dyren v. Leach*, 26 L. J., Ex. 221. In consequence of the erection of a hoarding by a contractor, which projected too far, and was consequently knocked down by a passing carriage, one of the contractor's labourers, was injured inside the hoard. It was held that no action lay by him against his master, the cause of injury being too remote, and the plaintiff being a voluntary workman with a full knowledge of the circumstances. *Assop v. Yates*, 2 H. & N. 768; S. C. *sub nom.* *Alsop v. Yates*, 27 L. J., Ex. 156; *Searle v. Lindsay*, 11 C. B., N. S., 429; 31 L. J., C. P. 106. Where the owner has machinery, which he is under a statutory liability to fence, in an unfenced state, he is responsible to a servant, who has, without negligence on his part, suffered injury through the machinery being unfenced. *Groves v. Ld. Wimborne*, (1898) 2 Q. B. 402, C. A. In such case it is no defence that the machine, which was originally fenced, had become unfenced through the negligence of a fellow servant. S. C. See also *Holmes v. Clarke*, 7 H. & N. 937; 31 L. J., Ex. 356, Ex. Ch.

The following cases illustrate the meaning of the terms fellow servants engaged in a common employment:—A servant of a railway company, travelling on their business, in one of their trains, was held to be the fellow servant of those who had charge of the train; so the ganger of the platelayers, whose business it was to keep the permanent way in repair, and the guard of a train, were held to be fellow labourers, so as to exempt the company from liability for hurt, received by one owing to the negligence of the other; *Hutchinson v. York, &c. Ry. Co.*, 5 Exch. 343. *Waller v. S. E. Ry. Co.*, 2 H. & C. 102; 32 L. J., Ex. 205; see also *Lovegrove v. L. Brighton & S. C. Ry. Co.*, 16 C. B., N. S. 669; 33 L. J., C. P. 329; and *Tunney v. Midland Ry. Co.*, L. R., 1 C. P. 291. So, a person in the employment of a railway company, engaged in painting a shed on their premises, is the fellow servant of a person who was employed to turn carriages on a turn-table. *Morgan v. Vale of Neath Ry. Co.*, 5 B. & S. 570; 33 L. J., Q. B. 260; Ex. Ch., L. R., 1 Q. B. 149. A foreman is a fellow labourer with the men whose work he superintends, for the purposes of this rule of non-liability of the master. *Gallagher v. Piper*, 16 C. B., N. S. 669; 33 L. J., C. P. 329. *Feltham v. England*, L. R., 2 Q. B. 33. So is a manager. *Wilson v. Merry*, L. R., 1 H. L. Sc. 326; *Howells v. Landore Siemen's Steel Co.*, L. R., 10 Q. B. 62. So, is the certificated manager of a coal mine, appointed as required by 35 &

36 V. c. 76, s. 26. S. C. So the master of a ship and her crew are engaged in a common employment. *Hedley v. Pinkney & Sons S.S. Co.*, (1894) A. C. 222. So are an actor and a scene-shifter at the theatre. *Burr v. Theatre Royal, &c.*, (1907) 1 K. B. 544, C. A.

See further on the rule as to injury by fellow servants, *Griffiths v. Gidlow*, 3 H. & N. 648; 27 L. J., Ex. 404; *Lovell v. Howell*, 1 C. P. D. 161; *Rourke v. White Moss Colliery Co.*, 1 C. P. D. 556; 2 C. P. D. 205, C. A.; *Allen v. New Gas Co.*, 1 Ex. D. 251, and the judgments in *Patterson v. Wallace*, 1 Macq. 748; *Barton's Hill Coal Co. v. Reid*, 3 Macq. 266; *Wilson v. Merry*, L. R., 1 H. L. Sc. 326; *Charles v. Taylor*, 3 C. P. D. 492, C. A.

The immunity of the master A. from liability for injury caused to C. by the negligence of his servant B. extends only to cases in which C. is also his servant, and B. and C. are engaged in a common employment, as to which see cases cited above; where C. is not A.'s servant A. is liable to him for B.'s negligence. Thus where two railway companies X. and Y. had the common use of a station: A., a servant of the X. Co., was crushed while working at the station, by a train of the Y. Co.; the jury found no negligence on the part of A., but only negligence of the Y. Co., by reason of a want of better rules for the direction of their servants; both companies used the same rules; the plaintiff was held entitled to recover. *Vose v. Lancashire, &c. Ry. Co.*, 2 H. & N. 728; 27 L. J., Ex. 249; see also *Warburton v. Gt. W. Ry. Co.*, L. R., 2 Ex. 30; *Swainson v. N. E. Ry. Co.*, 3 Ex. D. 341, C. A. So where the plaintiff, who was a servant in the employment of a carter, was sent by the defendant to fetch cotton from a warehouse, and, while loading his cart, was injured, by the carelessness of men in the defendant's service; it was held, that the defendant was liable, on the ground that the plaintiff was not a fellow servant of those who injured him. *Abraham v. Reynolds*, 5 H. & N. 143. So where the injury was caused to the plaintiff, the servant of H., who had contracted to build a house for L., by the negligence of a servant A. of the defendant, a person selected by L.'s architect and employed, under the terms of the contract, to lay the roof at a price to be paid by H., the defendant was held liable, on the same ground. *Johnson v. Lindsay*, (1891) A. C. 371, D. P., reversing S. C. in C. A., 23 Q. B. D. 508. The defendant F., a contractor for a building, employed M. to do piecework under him, and M. employed W. on the work; one of F.'s servants X. in the course of his work, dropped a heavy instrument on W. and thereby killed him; it was held that no action lay by W.'s executors against F. on the ground that W. and X. were fellow servants. *Wiggitt v. Fox*, 11 Exch. 832; 25 L. J., Ex. 188. In this case F. paid W.'s wages, and had control over him, and the right to dismiss him, see *per* Channell, B., 5 H. & N. 149, 150, but the case and this explanation were doubted by Cockburn, C.J., in *Rourke v. White Moss Colliery Co.*, 2 C. P. D. 208, C. A. It is only, however, on this state of facts that the decision can be supported. See observations, (1891) A. C. 379, 383. *per* Lds. Herschell and Watson. A pilot, compulsorily taken on board a ship, is not a fellow servant with the officers and crew of the ship. *Smith v. Steele*, L. R., 10 Q. B. 125; nor are the latter fellow servants with the servants of the stevedore employed to discharge the ship. *Cameron v. Nystrom*, (1893) A. C. 308, J. C.; *Union S. Ship Co. v. Claridge*, (1894) A. C. 185, J. C. So where a shipowner has two ships, A. and B., the seamen navigating A. are not fellow servants with those navigating B., when A. negligently runs down B. at anchor in an estuary; *The Petrel*, (1893) P. 320. The pauper inmate of a workhouse assisting by order of the labour master, in work being carried out by the guardians therein, is not a fellow servant with the workhouse officials engaged in the work. *Tozeland v. W. Ham Guardians*, (1906) 1 K. B. 538; affirm. on this point (1907) 1 K. B. 920, C. A.

When a Metropolitan cab proprietor lets a cab to a driver on the usual

terms, *vide ante*, pp. 776, 777, it is doubtful, whether the relation between the parties, is that of a bailor and bailee, or of master and servant; *Fowler v. Lock*, L. R., 7 C. P. 272; reversed in Ex. Ch., L. R., 9 C. P. 751, n.; but the proprietor is liable to the driver, if he do not take reasonable precautions to provide a horse reasonably fit for the purpose, and injury is thereby caused to the driver. S. C. on motion for second new trial; L. R., 10 C. P. 90. See cases cited *ante*, p. 777.

The Employers' Liability Act, 1880.] By the Employers' Liability Act, 1880 (43 & 44 V. c. 42), the liability of masters to their servants, for injury sustained in the course of their employment, has been considerably enlarged; sect. 1, subject to the qualifications and exceptions in sect. 2, defines the cases in which an action is maintainable by a "workman" against his "employer;" these "expressions" (see sect. 8, *infra*) being substituted, in this act, for the time-honoured names of "servant" and "master." The amount of compensation recoverable, is limited by sects. 3, 5, and written, though not necessarily formal, notice of the injury must be given, within six weeks; and the action commenced within six months from its occurrence (sects. 4, 7). By sect. 6, the action "shall be brought in the County Court," but it may be removed into a Superior Court, in the same way as other actions, and thus questions on the act may arise at *Nisi Prius*. By sect. 10, and 6 E. 7, c. 51, the act continues in force till December 31st, 1907.

By sect. 8, "For the purposes of this act, unless the context otherwise requires,"—"the expression 'employer' includes a body of persons corporate or unincorporate: the expression 'workman' means a railway servant, and any person to whom the Employers and Workmen Act, 1875, applies."

By the last mentioned act, 38 & 39 V. c. 90, s. 10, "the expression 'workman' does not include a domestic or menial servant, but, save as aforesaid, means any person, who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of 21 years or above that age, has entered into, or works under a contract with an employer, whether the contract be made before, or after the passing of this act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour." Sect. 13 provides that the act should not apply to seamen, or to apprentices to the sea service. By 43 & 44 V. c. 16, s. 11, this restriction is repealed; "but such repeal shall not, in the absence of any enactment to the contrary, extend to, or affect any provision, contained in any other Act of Parliament passed, or to be passed, whereby workman is defined by reference to the persons, to whom the Employers and Workmen Act, 1875, applies." Hence the Employers' Liability Act, 1880, does not extend to seamen and apprentices. *Corbett v. Pearce*, (1904) 2 K. B. 422. These terms include "every class of person who is connected with the ship as a seagoing instrument of navigation, or of transport of cargo from one place to another, and to services rendered by such persons in harbour as much as to services rendered by them at sea." S.C. *Id.* 427.

In order to ascertain if the plaintiff is a "workman" within the above definition, his real and substantial business must be considered, and not what he may do incidentally in the course of his employment. *Bound v. Lawrence*, *post*, p. 804. Thus the term includes a person whose duty it is to drive the defendant's carts, and load and unload goods therein in the course of the business of the defendant his master, a wharfinger. *Yarmouth v. France*, 19 Q. B. D. 647, M.R., and L.J.J. But it does not include a grocer's assistant whose duty is to serve customers in a shop and to perform other acts involving manual labour, as to make up parcels and carry them to the cart at the door and to bring up goods from the cellar. *Bound v. Lawrence*, (1892) 1 Q. B. 226, C. A. Nor does it include the conductor of an omnibus; *Morgan v.*

L. General Omnibus Co., 12 Q. B. D. 201; 13 Q. B. D. 832, C. A.; nor the driver of a tramcar; *Cook v. N. Metropolitan Tramways Co.*, 18 Q. B. D. 683; nor the guard of a goods train; *Hunt v. Gt. N. Ry. Co.*, (1891) 1 Q. B. 601; nor a person hired to mechanically develop his employer's inventions, and to originate inventions; *Jackson v. Hill*, 13 Q. B. D. 618. The term, however, includes one, who has contracted personally to execute manual work, although he is assisted by others, whom he selects and pays. *Grainger v. Ayusley*, and *Bromley v. Tams*, 6 Q. B. D. 482. See also *Stuart v. Evans*, *infra*. So the driver of a motor omnibus who also repairs it. *Smith v. Associated Omnibus Co.*, (1907) 1 K. B. 916. A workman employed by a sub-contractor E. to do work, which E. has contracted to do for F., does not work under a contract with F., under sect. 10. *Marrow v. Flimby, &c. Brick Co.*, (1898) 2 Q. B. 588, C. A.; *Fitzpatrick v. Evans*, (1902) 1 K. B. 505, C. A.

Sect. 1. "Where after the commencement of this Act personal injury is caused to a workman" (see sect. 8, *ante*, p. 804),

"(1.) By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer" (see sect. 8, *ante*, p. 804, and sect. 2 (1), *post*, p. 807);
"or

"(2.) By reason of the negligence of any person in the service of the employer, who has any superintendence entrusted to him," (see sect. 8, *post*, p. 807), "whilst in the exercise of such superintendence; or

"(3.) By reason of the negligence of any person in the service of the employer, to whose orders or directions, the workman, at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed; or

"(4.) By reason of the act, or omission of any person, in the service of the employer, done or made in obedience to the rules, or by-laws, of the employer, or in obedience to particular instructions, given by any person delegated with the authority of the employer in that behalf" (see sect. 2 (2), *post*, p. 807); "or

"(5.) By reason of the negligence of any person in the service of the employer, who has the charge, or control of any signal, points, locomotive engine, or train upon a railway,

"the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation, and remedies against the employer, as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work."

The effect of this section, in the cases in which it applies, is to negative the implied contract (*vide ante*, p. 801), that the employer shall not be liable for the negligence of a fellow workman; it does not prevent the workman from making an express contract with his employer to that effect. *Griffiths v. Dudley, Earl of*, 9 Q. B. D. 57. Where the workman has made such contract, his widow cannot sue for damages under the Fatal Accidents Act, 1846, *vide post*, p. 810. S. C. Contributory negligence (*vide ante*, pp. 780, 781) of the workman is a defence. See *Stuart v. Evans*, 49 L. T. 138, T. S., 1883, Q. B. D.; *Webbin v. Ballard*, 17 Q. B. D. 122. So where, with full knowledge of the dangerous character of the work, he voluntarily undertakes it, he cannot sue for resulting injury; for "*Volenti non fit injuria*;" *Thomas v. Quartermaine*, 18 Q. B. D. 685, C. A.; unless it arose from the master's neglect of a statutory precaution. *Baddeley v. Granville Earl*, 19 Q. B. D. 423. As to who is *volens* within this maxim, see *Yarmouth v. France*, and *Smith v. Baker*, *ante*, p. 801, and *Membery v. Gt. W. Ry. Co.*, and *Thrussell v. Handyside*, *ante*, p. 798.

In sect. 1 (1), "Any defect in the condition of the ways," &c., means one of a permanent, or *quasi* permanent nature. *McGiffin v. Palmer's Shipbuilding Co.*, 10 Q. B. D. 5. An obstruction, caused by an object which has fallen on the way, and could be at once easily removed, is not such a defect. *S. C.* Nor is the temporary removal of the lid, covering a pit lying in the course of the way. *Willets v. Watt*, (1892) 2 Q. B. 92, C. A. But the improper removal of a guard to dangerous machinery, whereby an accident arose, is such defect. *Tate v. Latham*, (1897) 1 Q. B. 502, C. A. And this subsection includes a case where a machine, although in the state in which it was constructed and intended to be, is not fit for the purpose to which it was applied. *Heske v. Samuelson*, 12 Q. B. D. 30; *Cripps v. Judge*, 13 Q. B. D. 583, C. A.; *Paley v. Garnett*, 16 Q. B. D. 52. So also a machine which is broken down and not in use. *Thompson v. City Glass Bottle Co.*, (1902) 1 K. B. 233, C. A. So also machinery which though safe for those working it, is dangerous to other workmen employed in the business. *Smith v. Baker*, (1891) A. C. 325, 354, *per* Ld. Watson. The term "way" includes any part of a shop where workmen are employed, which it is their duty to traverse in the course of their work. *Willets v. Watt*, *supra*. Works merely in the course of construction, for the employer's business, are not within sect. 1 (1). *Hove v. Finch*, 17 Q. B. D. 187. But where the defendant was engaged in demolishing a building, and, when partly pulled down, one of its walls, owing to not having been shored up, fell and injured the plaintiff, who was employed by the defendant on the work, the dangerous condition of the wall was held to be a defect in the condition of the works within sect. 1 (1). *Brannigan v. Robinson*, (1892) 1 Q. B. 344. "Plant" includes a horse employed in the defendant's business for drawing carts, and vice in the horse is "defect" in such plant. *Yarmouth v. France*, 19 Q. B. D. 647, Ld. Escher, M.R., and Lindley, L.J. The employer is not liable merely because the machine is dangerous; there must be a defect implying negligence of the employer, or of some one entrusted by him within sect. 2 (1), *post*, p. 807. *Walsh v. Whiteley*, 21 Q. B. D. 371, C. A.

On the construction of sects. 1 (2), and 8, *vide post*, p. 807.

In order to come within sect. 1 (3), the injury must be the result of negligence of the person giving the orders, and of the plaintiff conforming to them. *Wild v. Waygood*, (1892) 1 Q. B. 783, C. A. The direction in sect. 1 (3) may, without words, be inferred from the previous conduct of the parties. *Millward v. Midland Ry. Co.*, 14 Q. B. D. 68. Sect. 1 (3) does not include the negligence of a "ganger" or foreman of a gang of labourers while he is working with the gang. *Kellard v. Rooke*, 19 Q. B. D. 585; 21 *Id.* 367, C. A. Nor that of a person whose only duty is to tell the workmen what work to do, and not where or when to do it. *Snowden v. Baynes*, 24 Q. B. D. 568; 25 *Id.* 193, C. A.

A man whose duty it is to oil the points of a railway, he with several others, being under the control of an inspector of the company, has not "the charge or control of the points" within the meaning of sect. 1 (5). *Gibbs v. Gt. W. Ry. Co.*, 11 Q. B. D. 22; 12 Q. B. D. 208, C. A. *Semble* the provision applies to a man having charge of the points, for the purpose of traffic and movement. *S. C.* 11 Q. B. D. 26, *per* Mathew, J. A person in "charge or control of a train," within sect. 1 (5) does not necessarily cease to have such charge because part is uncoupled to be dealt with separately. *McCord v. Cammell*, (1896) A. C. 57, D. P. Different persons having duties to perform to separate parts of the train are within it. *S. C.* Where a train of trucks is moved by A., by means of a fixed engine which he works, A. is in charge of a train within sect. 1 (5). *Cor v. Gt. W. Ry. Co.*, 9 Q. B. D. 106. "Railway" in sect. 1 (5), is not confined to that of a railway company subject to the Railway Regulation Acts, but extends to a temporary railroad, laid by a

contractor, for the purpose of constructing works. *Doughty v. Firbank*, 10 Q. B. D. 358.

By sect. 2, "A workman shall not be entitled under this act, to any right of compensation, or remedy against the employer, in any of the following cases; that is to say,

- (1.) Under sect. 1 (1), "unless the defect therein mentioned arose from or had not been discovered, or remedied, owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him, with the duty of seeing that the ways, works, machinery, or plant were in proper condition."
- (2.) Under sect. 1 (4), "unless the injury resulted from some impropriety, or defect in the rules, bye-laws, or instructions therein mentioned; provided that where a rule, or bye-law, has been approved, or has been accepted as a proper rule, or bye-law, by one of Her Majesty's Principal Secretaries of State, or by the Board of Trade or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed for the purposes of this Act, to be an improper or defective rule or bye-law."
- (3.) "In any case, where the workman knew of the defect, or negligence, which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof, to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer, or such superior, already knew of the said defect or negligence."

Where the employer, A., placed a ladder for a purpose for which it was insufficient, and injury to a workman resulted therefrom, it was held there was negligence of A. within sect. 2 (1). *Cripps v. Judge*, 13 Q. B. D. 583, C. A. See also *Biddle v. Hart*, (1907) 1 K. B. D. 649, C. A. Where, however, A. has employed a competent contractor B., to supply plant, he is not liable for an accident caused to C. by B.'s negligence in constructing it, neither A. nor his foreman knowing that the plant was unsafe. *Kiddle v. Scott*, 16 Q. B. D. 605; *vide ante*, p. 776. But in the case of employments falling within the stat. 6 E. 7, c. 58, s. 13, *vide post*, p. 808, A. is now liable to C., but he has a remedy over against B.; *Id.*, s. 4.

It seems that sect. 2 (3), will exonerate the employer from liability in some cases in which he would have been liable at common law. *Stuart v. Evans*, *ante*, p. 805; *Weblin v. Ballard*, 17 Q. B. D. 122; *Smith v. Baker*, (1891) A. C. 355, 356, *per* Ld. Watson. It does not extend the master's liability beyond that imposed by sects. 1 and 2 (1). *Thomas v. Quartermaine*, 18 Q. B. D. 685, 693, C. A. See *Yarmouth v. France*, 19 Q. B. D. 647, 659, *per* Lindley, L.J.

Sect. 8. "For the purposes of this act, unless the context otherwise requires, the expression 'person who has superintendence entrusted to him,' means a person, whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour:" *vide* sect. 1 (2), *ante*, p. 805.

If such person be guilty of negligence, when voluntarily assisting in manual labour, the employer is liable for injury, thereby caused to a fellow-workman. *Osborne v. Jackson*, 11 Q. B. D. 619.

A man whose duty it is to guide the beam of a crane, by a guy rope, and to give directions when to lower or hoist the chains, is not within sect. 1 (2), as defined by sect. 8. *Shaffers v. General Steam Navigation Co.*, 10 Q. B. D. 356. Nor is the "ganger" or foreman of a gang of labourers while working with his gang. *Kellard v. Rooke*, 19 Q. B. D. 585; 21 *Id.* 367, C. A.

By sect. 3, "The amount of compensation, recoverable under this act, shall not exceed such sum, as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same

grade, employed during those years in the like employment, and in the district, in which the workman is employed at the time of the injury." Sect. 5 provides that from any such compensation, shall be deducted any penalty, paid to the workman, or his representatives, in pursuance of any other statute. Sect. 6 excludes prospective earnings. *Noel v. Redruth Foundry Co.*, (1896) 1 Q. B. 453.

By sect. 4, "An action for the recovery under this act of compensation for an injury, shall not be maintainable, unless notice that injury has been sustained, is given within 6 weeks, and the action is commenced within 6 months, from the occurrence of the accident causing the injury; or, in case of death, within 12 months from the time of death: Provided always, that in case of death, the want of such notice shall be no bar, to the maintenance of such action, if the judge shall be of opinion that there was reasonable excuse for such want of notice."

By sect. 7, "Notice in respect of an injury under this act, shall give the name and address of the person injured, and shall state in ordinary language, the cause of the injury, and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers. The notice may be served, by delivering the same to, or at the residence, or place of business, of the person on whom it is to be served. The notice may also be served by post, by a registered letter, addressed to the person, on whom it is to be served, at his last known place of residence, or place of business; and, if served by post, shall be deemed to have been served at the time, when a letter containing the same, would be delivered in the ordinary course of post; and, in proving the service of such notice, it shall be sufficient to prove, that the notice was properly addressed and registered. Where the employer is a body of persons, corporate or unincorporate, the notice shall be served, by delivering the same at, or by sending it by post, in a registered letter, addressed to the office, or, if there be more than one office, any one of the offices of such body.

"A notice, under this section, shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action, arising from the injury mentioned in the notice, shall be of opinion that the defendant in the action, is prejudiced in his defence, by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading."

This notice must be in writing; *Moyle v. Jenkins*, 8 Q. B. D. 116; *Keen v. Milwall Dock Co.*, 8 Q. B. D. 482, C. A.; and must contain all the particulars required by sect. 7. S. C. It seems sufficient if it refer to the particulars contained in another writing. S. C. The notice need not state the cause of action. *Clarkson v. Musgrave*, 9 Q. B. D. 386. A letter giving the date of the injury, and stating that the plaintiff had been under medical treatment, "for the injury to his leg," was held to be sufficient, being defective only, within the last paragraph of sect. 7. *Stone v. Hyde*, *Id.* 76. So a notice which omitted the date on which the injury was alleged to have been sustained. *Carter v. Drysdale*, 12 Q. B. D. 91.

Workmen's Compensation Act, 1906.—The Workmen's Compensation Act, (1906) 6 E. 7, c. 58 (replacing 60 & 61 V. c. 37), in general enables a workman (see sect. 13), by proceedings taken under that act, to obtain compensation from his employers for personal injury by accident, arising out of or in the course of his employment, although the employer would not previously have been liable therefor. The procedure is by arbitration and in the County Court: sect. 1 and schedules.

By sect. 1 (4) and 2 (1), where, within six months from the occurrence of an accident, causing injury, or in the case of death, within six months therefrom, an action is brought to recover damages, independently of that

act, for injury caused by such accident, and it is determined in such action that the employer is not liable therein, but that he would have been liable to pay compensation under the provisions of that act, the action shall be dismissed, but the court in which the action is tried shall, if the plaintiff so choose, proceed to assess such compensation, and may deduct therefrom all the costs caused by the plaintiff bringing the action, instead of proceeding under that act. The certificate of compensation awarded, and of costs deducted therefrom, shall have the effect of an award under that act. The unsuccessful plaintiff must elect, at the trial, if he wish to proceed under the above proviso, he cannot subsequently institute fresh proceedings under the act. *Edwards v. Godfrey*, (1899) 2 Q. B. 333, C. A. If he so elect, an award of compensation is a bar to an application for a new trial of the original action. *Neale v. Electric, &c. Co.*, (1906) 2 K. B. 558, C. A. *Secus* where compensation was refused on the ground that the act did not apply. *Isaacson v. New Grand (Clapham Junction)*, (1903) 1 K. B. 539.

By sect. 1 (2b), "When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this act shall affect any civil liability of the employer, but in that case the workman may at his option, either claim compensation under this act or take proceedings independently of this act, but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of, and also under this act, and shall not be liable to any proceedings independently of this act, except in case of such personal negligence or wilful act as aforesaid." The contract by a workman for a scheme of compensation under sect. 3 (1), is an exercise of the option under sect. 1 (2b), and bars a claim by his representatives for damages under 43 & 44 V. c. 42, *ante*, pp. 804 *et seq.* *Taylor v. Hamstead Colliery Co.*, (1904), 1 K. B. 838, C. A. The right of an infant apprentice to sue independently of the act is not barred by the acceptance of such a scheme, where it is not for his benefit. *Stephens v. Dudbridge Ironworks Co.*, (1904) 2 K. B. 225, C. A. The filing of a request for arbitration under the act, which was withdrawn after the defence had been filed, and before the hearing is no bar to such action for damages under 43 & 44 V. c. 42. *Rouse v. Dixon*, (1904) 2 K. B. 628, C. A.

By sect. 6, "Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—(1) the workman may take proceedings both against that person to recover damages, and against any person liable to pay compensation under this act, for such compensation, but shall not be entitled to recover both," and (2) the person paying such compensation, or who has been called on to pay an indemnity under sect. 4, relating to sub-contracting, shall be entitled to be indemnified by the person so liable to pay damages, and the indemnity may be enforced by action in the High Court. *Evans v. Cook*, (1905) 1 K. B. 53, C. A. The right to indemnity applies where the compensation was paid under an agreement between the injured workman W. and the employer E., after notice of the accident and the claim for compensation had been given by W. to E., but without further proceedings. *Thompson v. N. E. Marine Engineering Co.*, (1903) 1 K. B. 428.

As to the alteration in the common law liability of A., in respect of work negligently done by his sub-contractor B., under sect. 4, *vide ante*, p. 807.

Wrongful Act, Default, or Neglect causing Death.

By the Fatal Accidents Act, 1846 (usually known as *Ld. Campbell's Act*), 9 & 10 V. c. 93, s. 1, whenever the death of a person is caused by wrongful act, neglect, or default, which would, if death had not ensued, have entitled the party injured to maintain an action, then the person who would have been liable, if death had not ensued, shall be liable to an action for damages, though the death was caused by an act amounting to felony; and (sect. 2), the action shall lie for the benefit of the wife, husband, parent and child of the deceased, and in the name of the executor or administrator, and "the jury may give such damages as they may think proportioned to the injury, resulting from such death to the parties respectively, for whom, and for whose benefit, such action shall be brought," and the amount, after deducting costs not recovered from the defendant, shall be divided amongst the above "parties in such shares as the jury by their verdict shall find and direct." By sect. 3, only one action will lie for the same subject of complaint, and it must be commenced within 12 calendar months after the death. Sect. 4 requires the delivery to the defendant, of a full particular of the persons for whom, and on whose behalf, the action is brought, and the nature of the claim. By sect. 5, the word "person," is explained to include corporations; the word "parent," includes father, mother, grandfather, grandmother, stepfather, and stepmother; and the word "child," includes son, daughter, grandson, granddaughter, stepson, and stepdaughter. It includes a child *in ventre sa mere*; *The George and Richard*, L. R., 3 Adm. 466; but it does not include an illegitimate child, even where its mother is the person killed. *Dickenson v. N. E. Ry. Co.*, 2 H. & C. 735; 33 L. J., Ex. 91.

By the Fatal Accidents Act, 1864, 27 & 28 V. c. 95, s. 1, where there is no executor, or administrator of the person killed, or there being such executor, &c., no action is brought within six months by him, the action may be brought, by persons beneficially interested in the result of the action. By sect. 2, money paid into court by the defendants may be paid in one sum, without regard to its division into shares, and if this sum is not accepted, and the jury think it sufficient, the defendant is entitled to a verdict. No provision is made for apportioning the amount paid into court, where it is accepted in full satisfaction of the claim; but it would seem that in such case, the court will apportion the amounts. See *Bulmer v. Bulmer*, 25 Ch. D. 409, where a railway company compromised a claim without action.

Loss of life, occasioned by collision of ships at sea may be sued for under these acts, subject to the limitation of liability provided by 57 & 58 V. c. 60, s. 503, *ante*, p. 787. *Glaholm v. Barker*, L. R., 1 Ch. 223. It does not, however, afford ground for an action *in rem* against a foreign ship. *The Vera Cruz*, 10 Ap. Ca. 59, D. P. The list made up under *Id.*, sect. 312, of passengers on board, is under sect. 507, "evidence that the person upon whose death proceedings are taken," "was a passenger on board the ship at the time of his death." The acts apply to the death of an alien, caused beyond the jurisdiction by the negligence of a British subject. *Davidson v. Hill*, (1901) 2 K. B. 606 dissenting from *Adam v. British and Foreign S.S. Co.*, (1898) 2 Q. B. 430, *cor. Darling, J.*

The action is maintainable under these statutes after A.'s death, by his personal representative R., only when A. if alive could have sued the defendant in respect of his injury, for no fresh cause of action arises to R. on A.'s death. Hence, when A. had accepted compensation for his injury; *Read v. Gt. E. Ry. Co.*, L. R., 3 Q. B. 555, or had agreed to make no claim for any damage, if sustained, *Griffiths v. El. of Dudley*, 9 Q. B. D. 357; *The Stella*, (1900) P. 161, or A.'s claim would have been barred by stat. 56 & 57 V. c. 61, s. 1,

post, p. 1131; *Williams v. Mersey Docks' Board*, (1905) 1 K. B. 804, C. A., R. cannot maintain the action.

Damages.] The jury, in estimating the damages to be recovered under this act, cannot take into consideration, the mental suffering of the survivors, or loss of society which they have sustained, but are to award them compensation for pecuniary loss alone. *Blake v. Midland Ry. Co.*, 18 Q. B. 93; 21 L. J., Q. B. 233; *accord. Patterson v. Wallace*, 1 Macq. 748. Therefore, mere proof of death and negligence, will give no right even to nominal damages. *Duckworth v. Johnson, infra*. But, a reasonable expectation of pecuniary advantage, to the surviving relative who sues, may be considered by the jury; as where a surviving parent (who sues as administrator) received habitual assistance from his son, who was killed by the accident. *Franklin v. S. E. Ry. Co.*, 3 H. & N. 211; *Dalton v. Id.*, 4 C. B., N. S. 296; 27 L. J., C. P. 227. But, the plaintiff cannot recover the expenses of the funeral or mourning. S. C.; *Clark v. L. Gen. Omnibus Co.*, (1906) 2 K. B. 648, C. A.; see also *Condon v. Gt. S. & W. Ry. Co.*, 16 Ir. C. L. R. 418. Proof, that the small weekly wages of the deceased, were contributed towards the expenses of his parent's house, is evidence for the jury, though it is not shown, whether the sum did more than cover the expense of the child's maintenance. *Duckworth v. Johnson*, 4 H. & N. 653; 29 L. J., Ex. 25. A parent can recover, only where the pecuniary advantage he has lost by the death arose from his relationship to the deceased, and not where it was derived from a contract between them. *Sykes v. N. E. Ry. Co.*, 44 L. J., C. P. 191. Where a gentleman of fortune was killed, and the only effect of his death, was to cause his property to be distributed according to the terms of a settlement, the bulk of it passing to his eldest son, it was held, that though the estate survived for the benefit of the family as a whole, yet that if the death occasioned to any one of them, the loss of future pecuniary benefit which might reasonably have been expected, the jury might award compensation in respect of such loss. *Pym v. Gt. N. Ry. Co.*, 4 B. & S. 396; 32 L. J., Q. B. 377, Ex. Ch.

The expectation of life of the deceased, is an element to be considered by the jury, in assessing the damages. *Rowley v. L. & N. W. Ry. Co.*, L. R., 8 Ex. 221, Ex. Ch. But, the jury are to take a reasonable view of the case, and to give fair compensation, and not to treat the damages on the footing of the value of an annuity. *Armsworth v. S. E. Ry. Co.*, 11 Jur. 758, Surrey Summer Assizes, 1847, *cor.* Parke, B., cited L. R., 8 Ex. 230; see also *Phillips v. L. & S. W. Ry. Co.*, 4 Q. B. D. 406; 5 Q. B. D. 78, C. A., and other cases cited, *ante*, p. 782.

Where an action was brought, for the benefit of the mother, to whom the deceased had covenanted to pay an annuity of 200*l.* for their joint lives, and the deceased was in business, a direction to the jury that they might give as damages, such a sum as would purchase an annuity of 200*l.*, for the same period was held wrong, it being only secured by a personal covenant. *Rowley v. L. & N. W. Ry. Co., supra*. An accountant conversant with the business of life assurance offices, may prove the expectation of life, by reference to the Carlisle Tables used by the offices. S. C., *Id.*; *vide ante*, p. 176. A life is *primâ facie* to be presumed to be of the average duration. S. C.; see *McDonald v. McDonald*, 5 Ap. Ca. 519, D. P. But evidence of the deceased's state of health is admissible to rebut this presumption, and to show his real expectation of life. S. C. The amounts received by the parties for whose benefit the action is brought, on policies, are to be taken into account by the jury, in assessing the damages. *Hicks v. Newport, &c. Ry. Co.*, 4 B. & S. 403, n., *cor.* Campbell, C.J., approved by Bramwell, B., in *Bradburn v. Gt. W. Ry. Co.*, L. R., 10 Ex. 1, 2. In the case of a life

policy effected by a person likely to keep it up, the benefit accruing from the accelerated receipt of the money may be compensated by deducting the amount of premiums that would have to have been paid to keep it up from the estimate of future earnings. *Grand Trunk Ry. Co. of Canada v. Jennings*, 13 Ap. Ca. 800, J. C., following *Hicks v. Newport, &c. Ry. Co.*, *supra*. But in the case of a policy against accidents, the whole amount received under the policy is to be deducted from the damages sustained. S. C. It is, however, otherwise in respect of the amount received under a policy effected by the deceased with the Railway Passengers' Assurance Co. See 55 & 56 V. cap. viii. s. 31.

Defence to Actions for Negligence.

The head of defence under actions of nuisance, *ante*, p. 772, is in some respects, applicable also to this head of actions for negligence. Several defences have already been noticed under the foregoing heads of negligence.

The defence, where it exists, that the injury or accident was owing to the plaintiff's contributory negligence, *vide ante*, pp. 780, 781, 786, must now be pleaded specially. Rules, 1883, O. xix., r. 15, *ante*, p. 309.

ACTION FOR DISTURBANCE OF SUPPORT OF LAND.

It has been laid down in several cases, that, apart from any question of negligence, no one has a right to deprive the soil of his neighbour, while in its original condition, of lateral support. *Wilde v. Minsterley*, 2 Roll. Abr. 564; *Wyatt v. Harrison*, *infra*; *Hunt v. Peake*, John. 705; 29 L. J., Ch. 785. But the owner A., of land M., has only the right to the support of the land N., which is adjacent or neighbouring to M., *i.e.*, of the land which would in its natural state have afforded support to M. *Birmingham, Cor. of v. Allen*, 6 Ch. D. 284, C. A. If, therefore, the support which would have been given by N., is destroyed by excavation, by a third party, A. acquires no right of support against the land beyond N. S. C. See also *Partridge v. Scott*, *post*, p. 813.

Where the plaintiff has placed a house, or other additional weight upon his ground, he cannot, independently of any acquired right, insist upon its being supported by the adjoining land of the defendant. Thus where the defendant, digging in his own land, near the foundation of a newly-built house of the plaintiff, caused it to fall, and beyond this there was no proof of negligence: held, that the plaintiff had no remedy. *Wyatt v. Harrison*, 3 B. & Ad. 871; *accord*. *Partridge v. Scott*, *post*, p. 813; also see *Gayford v. Nicholls*, 9 Exch. 702; 23 L. J., Ex. 205; *Caledonian Ry. Co. v. Sprot*, 2 Macq. 449. If, however, the defendant's excavation would have caused the plaintiff's land to sink, had there been no erection on it, an action will lie; *Brown v. Robins*, 4 H. & N. 186; 28 L. J., Ex. 250; unless the damage would in this case have been inappreciable; *Smith v. Thackerall*, L. R., 1 C. P. 564; for the right to lateral support is not an absolute right, and the infringement of it is not a cause of action without appreciable damage. S. C.; *Bonomi v. Buckhouse*, 9 H. L. C. 503; 34 L. J., Q. B. 181. See, however, *Att.-Gen. v. Conduit Colliery Co.*, (1895) 1 Q. B. 301, 311 *et seq.*, *per* Collins, J. Where the defendant, by draining his land, drains away subterranean water from under the plaintiff's land, and thereby causes it to sink, no action is maintainable. *Popplewell v. Hodgkinson*, L. R., 4 Ex. 248, Ex. Ch.; and see *Elliott v. N. E. Ry. Co.*, *infra*. *Secus*, where the

subsidence has been caused by the defendant's pumping out water and silt from under the plaintiff's land; *Jordeson v. Sutton, &c. Gas Co.*, (1899) 2 Ch. 217, C. A., *disc.* V. Williams, L.J.; (on appeal to D. P. the case was settled: see Min. of Proceedings, p. 657, May 8th, 1900); or removing from his land part of a bed of natural pitch which extended under the plaintiff's land. *Trinidad Asphalt Co. v. Ambard*, (1899) A. C. 591, J. C. As to remedy for injury caused by brine pumping, see stat. 54 & 55 V. c. 40. See also *Salt Union v. Brunner & Co.*, cited *post*, p. 839.

The plaintiff may, however, acquire a right to the support of the defendant's soil, by grant express or implied. *Partridge v. Scott*, 3 M. & W. 220, 228. Thus, where the defendant sells part of his land to the plaintiff, for the purpose of the erection of buildings thereon, he impliedly grants sufficient lateral support, from his adjacent land, for such buildings. *Elliott v. N. E. Ry. Co.*, 10 H. L. C. 333; 32 L. J., Ch. 402; *Siddons v. Short*, 2 C. P. D. 572; *Rigby v. Bennett*, 28 Ch. D. 559, C. A.; and see *Richards v. Rose*, *ante*, p. 38. Such a grant is to be presumed by the lapse of 20 years during which the support has been enjoyed, where there is no concealment, and the enjoyment is so open, that the owner of the servient land must know that it gives some support to the dominant land. *Angus v. Dalton*, 6 Ap. Ca. 740, D. P. See *Union Lighterage Co. v. L. Graving Dock Co.*, (1902) 2 Ch. 557, C. A. But if an old house be raised in height, so that the weight superincumbent on the soil is increased, the right of support cannot be claimed in respect of the increased weight; *Murchie v. Black*, 19 C. B., N. S. 190; 34 L. J., C. P. 337; until the lapse of 20 years, from the time of the increase having been made. *Angus v. Dalton*, *supra*.

With regard to the support given by one house to the adjoining one built against it, it has been held, that there is no obligation towards a neighbour, cast by law on the owner of a house, merely as such, to keep it repaired in a substantial manner; the only duty is to keep it in such a state, that his neighbour may not be injured by its fall. *Chantler v. Robinson*, 4 Exch. 163, 170. In *Peyton v. London, Mayor of*, 9 B. & C. 725, it was held, that the fact that the defendant in removing his house, had neglected to shore up that of the defendant, was no evidence of negligence. In *Chadwick v. Trower*, 6 N. C. 1, Ex. Ch., it was laid down that there was no obligation upon the defendant, under similar circumstances, to give notice to the plaintiff of what he was about to do. See *Kempston v. Butler*, 12 Ir. C. L. R. 516. In *Dodd v. Holme*, 1 Ad. & E. 493, it was said that the question was, whether the damage complained of, was owing to the improper acts of the defendant, and that the jury, on inquiring into the alleged neglect, should consider the state of the building before it was injured. *Walters v. Lfeil*, M. & M. 365; *Brown v. Windsor*, 1 C. & J. 20. But this right of support from adjoining houses may be acquired by grant, express or implied; as to this, see *ante*, pp. 38 *et seq.* Thus, it may be proved by showing that the houses of the plaintiff, and of the defendant, were originally built so as to depend upon one another, while the land whereon they stand was in the possession of the same owner; *Richards v. Rose*, 9 Exch. 218; 23 L. J., Ex. 3; and open enjoyment of the support, for 20 years is sufficient. *Hide v. Thornborough*, 2 Car. & K. 250; see also *Angus v. Dalton*, *supra*. In *Solomon v. Vintners' Co.*, 4 H. & N. 585; 28 L. J., Ex. 370, the right was held not to apply, as against the owner of the house next but one. The support must have been enjoyed as of right. *Tone v. Preston*, 24 Ch. D. 739. See further *post*, pp. 828, 829. The right is within the Prescription Act, 2 & 3 W. 4, c. 71, *post*, p. 827. *Lemaitre v. Davis*, 19 Ch. D. 281. In assessing damages, for pulling down a house, so as to cause injury by its fall, to the adjoining house, the jury may consider *quo animo* the wrongful act was done. *Emblen v. Myers*, 6 H. & N. 54; 30 L. J., Ex. 71.

With regard to the right to support, from subjacent strata, it has been held, that when the surface, and the underground minerals, are vested in different owners, and nothing appears to show how they became separated, the superficial owner is entitled to adequate underground support, and the mine owner must so work the mines as to sustain the surface in its natural state. *Humphries v. Brogden*, 12 Q. B. 739. The *prima facie* right of the owner of land, to support from his next neighbour's land, whether the support be lateral or underground, is of common right, and is not a mere easement, to be gained only by lapse of time, or by grant, reservation, or covenant, but is a restraint on the enjoyment of the adjacent property, in accordance with the maxim, "*sic utere tuo ut alienum non lædas.*" S. C. See also *Davis v. Treharne*, *infra*. The owner of land upon which a building has been erected, may maintain an action for an injury arising from underground workings, if the jury are of opinion that the weight of the building did not cause the injury; *Brown v. Robins*, 4 H. & N. 186; 28 L. J., Ex. 250; *Stroyan v. Knowles*, 6 H. & N. 454; 30 L. J., Ex. 102; and by 20 years' user, the right of support will be presumed to have been acquired, by grant, for buildings erected on the land; *Rogers v. Taylor*, 2 H. & N. 828; 27 L. J., Ex. 173; even although the mine owner, would otherwise have had the right to let down the surface; *Bell v. Love*, 10 Q. B. D. 547, 571, *per* Lindley, L. J.; but not, it would seem, where neither party was aware of the excavation under the plaintiff's buildings. *Partridge v. Scott*, 3 M. & W. 220.

In the case of a mining lease granted by an owner in fee, the rights of the several parties are ascertained on the construction of the deed, and if it thereby appear to have been the intention of the parties, that the mine owner should be at liberty to let down the surface, the surface owner will have no remedy. *Smith v. Darby*, L. R., 7 Q. B. 716; *Eudon v. Jeffcock*, L. R., 7 Ex. 379; *Buchanan v. Andrew*, L. R., 2 H. L. Sc. 286. Such intention must, however, be expressed, in plain terms, when the reservation of the right to let down the surface, is in derogation of the grant thereof. *Mundy v. Duke of Rutland*, 23 Ch. D. 81, C. A. A reservation of mines and minerals gives the right to take such constituent parts of the earth as have "a use and value of their own independent of their being constituents of the soil." *Jersey, El. of v. Neath Union*, 22 Q. B. D. 555, 561, C. A., following *Hext v. Gill*, L. R., 7 Ch. 699; *Johnstone v. Crompton*, (1899) 2 Ch. 190. As to the reservation in case of a compulsory purchase under the Railway Clauses Consolidation Act, 1845, &c., *vide post*, p. 815. As to the construction of a conveyance in fee of the surface, reserving the minerals, with clause for compensation, for damage done to the grantee, by the winning of the minerals by the grantor, see *Mordue v. Durham, Dean, &c. of*, L. R., 8 C. P. 336; *Aspden v. Seddon*, L. R., 10 Ch. 394. But a mere reservation of minerals does not carry the right to destroy the surface. *Hext v. Gill*, *supra*. And even although a mining lessee, had liberty to work the mines, in the most approved manner, and to enter the land and carry away minerals, and erect buildings, &c., necessary, making compensation, it was held he must not let down the surface. *Davis v. Treharne*, 6 Ap. Ca. 460, D. P. See also *Smart v. Morton*, 5 E. & B. 30; 24 L. J., Q. B. 260. The same principle applies where an inclosure act has reserved the right of the lord of the manor to work mines, in the private allotments, making compensation for damage. *Haynes v. Roberts*, 7 E. & B. 625, Ex. Ch.; *Love v. Bell*, 9 Ap. Ca. 286, D. P.; *Bishop Auckland, &c. Soc. v. Butterknowle Colliery Co.*, (1904) 2 Ch. 419 C. A.; (1906) A. C. 305, D. P. See *Benfieldside Local Board v. Consett Iron Co.*, 3 Ex. D. 54. In *Ronbotham v. Wilson*, 8 H. L. C. 348; 30 L. J., Q. B. 49, an inclosure act had expressly taken away this protection, from the allottees of the surface; and it was held, that the owner of the mines was not liable for injury to the surface, if such injury arose from working the mines in a reasonable manner,

and was not the result of wilfulness or negligence. The common-law right to support, is independent of the question, whether the working has been careful or careless. *Humphries v. Brogden*, *ante*, p. 814.

The right of working mines, reserved to the vendor of lands to a railway or canal company, depends upon the construction to be put upon the special provisions of the Act. See *Gt. W. Ry. Co. v. Bennett*, L. R., 2 H. L. 27; *Caledonian Ry. Co. v. Sprot*, 2 Macq. 442; *Elliot v. N. E. Ry. Co.*, 10 H. L. C. 333; 32 L. J., Ch. 402; *R. v. Aire & Calder Navigation*, 30 L. J., Q. B. 337; *Stourbridge Canal Co. v. Dudley*, 3 E. & E. 409; 30 L. J., Q. B. 108; *Dunn v. Birmingham Canal Co.*, L. R., 7 Q. B. 244; L. R., 8 Q. B. 42, Ex. Ch.; *Knowles v. Lancashire and Yorkshire Ry. Co.*, 14 Ap. Ca. 248, D. P.; *L. & N. W. Ry. v. Evans*, (1893) 1 Ch. 16, C. A.; *Chamber Colliery Co. v. Rochdale Canal Co.*, (1894) 2 Q. B. 632, C. A. If the company be regulated by the Railways Clauses Consolidation Act, 1845 (8 & 9 V. c. 20), the company does not, under a statutory purchase of the land, acquire the right of an ordinary purchaser, to subjacent and adjacent support; and the owner of the mines underneath the railway, may, after giving the notice provided by the act, work them in a proper manner, according to the usual manner of working mines in the district; sects. 77, 78, 79; *Gt. W. Ry. Co. v. Bennett*, *supra*; approving *Dudley Canal Co. v. Grazebrook*, 1 B. & Ad. 59; even although this manner is by surface workings; *Midland Ry. v. Robinson*, 15 Ap. Ca. 19, D. P.; *Ruabon Brick, &c. Co. v. Gt. W. Ry. Co.*, (1893) 1 Ch. 427, C. A.; or the effect of the working is to let down the surface. *Pountney v. Clayton*, 11 Q. B. D. 820, C. A. See also *Gt. W. Ry. Co. v. Smith*, 3 Ap. Ca. 165, D. P.; *In re Ld. Gerard & L. & N. W. Ry. Co.*, (1895) 1 Q. B. 459, C. A. As to the right of support from adjoining strata where the land has been bought with the minerals under it, see *Manchester Cor. v. New Moss Collieries*, (1906) 2 Ch. 564, C. A.

Clay forming the surface or sub-soil of land compulsorily taken, is not a mineral within these sections. *Gt. W. Ry. Co. v. Blades*, (1901) 2 Ch. 624, C. A.; *accord. Todd Birleston & Co. & N. E. Ry. Co.*, (1903) 1 K. B. 603, C. A.; nor under the provisions of the Waterworks Clauses Act, 1847, 10 & 11 Vict. c. 17, ss. 18, 22, 23, *supra*. *Glasgow, Provost, &c. of v. Farie*, 13 Ap. Ca. 657, D. P.

The statement of claim need not allege a right to support, and if the defendants have a right to take minerals under the plaintiff's land, without leaving a sufficient support, this defence must be pleaded specially. *Jeffries v. Williams*, 5 Exch. 792; *Bibby v. Carter*, 4 H. & N. 153; 28 L. J., Ex. 182.

A mineral owner is not liable for damage resulting from the working by his predecessor in title. *Greenwell v. Low. Beechburn Coal Co.*; *Hull v. Norfolk, Dk. of*, *ante*, p. 773.

Damages—Injunction.] The damages recoverable are limited, to those that have already accrued, from the interference with the plaintiff's right of support, for he can maintain a fresh action for each subsequent injury he may sustain by further subsidence; *Darley Main Colliery Co. v. Mitchell*, 11 Ap. Ca. 127, D. P.; but depreciation caused by risk of future subsidence must be taken into account. *Tunnicliffe & Hampson v. W. Leigh Colliery Co.*, (1906) 2 Ch. 22, C. A., *diss. Romer, L.J.* See further, *ante*, p. 773. By Rules, 1883, O. xxxvi. r. 58, "Where damages are to be assessed in respect of any continuing cause of action they shall be assessed down to the time of assessment." See hereon, *ante*, p. 295. Where the defendant, the owner of a mine under a highway vested in the plaintiffs as the urban authority under the Public Health Act, 1875, s. 149, *post*, p. 933, wrongfully let down the highway by working the mines, the plaintiffs may recover the cost of restoring the

highway to its former level, and are not limited to that of making it as commodious to the public as before. *Wednesbury Cor. v. Lodge Holes Colliery Co.*, (1906) 1 K. B. 78, C. A. Where there is a reasonable probability of damage resulting from the disturbance of the support of land, the court will grant an injunction, before any actual damage occurs. *Siddons v. Short*, 2 C. P. D. 572.

Statute of Limitation.] *Vide ante*, p. 773.

ACTION FOR OBSTRUCTION OF LIGHT AND AIR.

The statement of claim usually states the possession of a house, in which are certain windows, through which light and air ought of right to enter; the obstruction of the light by the defendant; and the consequent injury to the house. The action may be brought by a reversioner, in which case further statements will be necessary in the statement of claim. *Turner v. Sheffield Ry. Co.*, 10 M. & W. 425; *Shadwell v. Hutchinson*, M. & M. 350; *Id. v. Id.*, 2 B. & Ad. 97.

The right to the light and air.] The right to light and air is analogous to the right to use running water, and is enjoyed *jure nature*. See *post*, p. 837. It is not strictly the subject of *grant*, because it is not in the power of any one to grant it; but the privilege to have the use of light or air in a particular place, or on certain premises, free from the right of obstructing them by another person, in the like lawful enjoyment of his own property, is a right, which must depend on some covenant, or contract, between the parties, express or implied, or upon some prescription which presupposes such contract; or by some other adequate authority binding on both parties, as a local custom, &c.; see observations of Littledale, J., in *Moore v. Rawson*, 3 B. & C. 339.

For the purpose of facilitating the acquisition, and protection of the right of light to a building, where it is claimed by virtue only of long enjoyment, the Prescription Act, 1832 (2 & 3 W. 4, c. 71), was passed, which by sect. 3 enacts, "that when the access and use of light to, and for, any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith, for the full period of 20 years without interruption, the right thereto, shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement, expressly made, or given for that purpose, by deed or writing."

By sect. 4, "Each of the respective periods of years, hereinbefore mentioned, shall be deemed and taken to be, the period next before some suit or action, wherein the claim, or matter to which such period may relate, shall have been, or shall be brought into question, and that no act or other matter, shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to, or acquiesced in, for one year after the party interrupted, shall have had, or shall have notice thereof, and of the person making or authorizing the same to be made."

By sect. 5 (cited in full *post*, p. 828), if the right, as alleged generally in an action on the case, is denied, all matters in the Act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation.

By sect. 6, no presumption shall be allowed, or made in favour, or support of any claim, upon proof of the exercise or enjoyment of the right, or matter

claimed, for any less period or number of years than the period or number mentioned in the act as applicable to the case.

Sect. 7 (*post*, p. 823), which relates to the computation of time in cases of disability, is inapplicable to sect. 3.

The statute has not altered the nature and extent of the right to light, but only in the mode in which the right can be gained. *Kelk v. Pearson*, L. R., 6 Ch. 809; *Colls v. Home & Colonial Stores*, *post*, p. 821. Nor does it take away any of the modes, of claiming easements, existing prior thereto. *Gardner v. Hodgson's, &c. Brewery Co.*, (1903) A. C., 229, 238, 239, *per* Ld. Lindley, citing *Aynsley v. Glover*, L. R., 10 Ch. 283, (where a right to light by immemorial prescription was proved). As to the extent of the right, see *Colls v. Home & Colonial Stores*, and *Ambler v. Gordon*, *post*, p. 821. The right cannot be acquired under sect. 3, over Crown land, as the statute does not bind the Crown. *Perry v. Eames*, (1891) 1 Ch. 658. Even although the land is in the possession of a lessee from the Crown. *Wheaton v. Maple & Co.*, (1893) 3 Ch. 48, C. A. Sect. 2, *post*, p. 827, does not affect the right to light. S. CC.

Before the above Act, an enjoyment for 20 years and upwards was the usual mode of establishing a right, alleged in the declaration to be prescriptive, or to be derived from a lost grant. And where the windows were alleged to be "ancient," proof of enjoyment for 20 years, was held to satisfy the allegation. 2 Selw. N. P. 13th ed. 1072; *Mounsey v. Ismay*, 3 H. & C. 496; 34 L. J., Ex. 55, *per* Martin, B. But the right could not be generally established, by mere user, where the premises against which the right was sought to be established, *i.e.*, the servient tenement, were under lease, or in possession of the tenant of a particular estate. *Daniel v. North*, 11 East, 372. The right may now be acquired indefeasibly, in such case under sect. 3. Hence, the easement or servitude *altius non tollendi* and *ne luminibus officiat*, may now be established over the land, even as against the landlord, if the tenant chooses to submit to it. *Simper v. Foley*, 2 J. & H. 555. And where A. and B. occupy as lessees adjacent properties, P. and Q. respectively, under the same landlord, C.; 20 years' user by A. over Q., gives A. and his successors an indefeasible right to the access of light, as against B. and C. and all succeeding owners of Q. *Frewen v. Phillips*, 11 C. B., N. S. 449; 30 L. J., C. P. 356, Ex. Ch.; *Fear v. Morgan*, (1906) 2 Ch. 406, C. A. And this right is retained after a renewal of A.'s lease. S. C.; *Robson v. Edwards*, (1893) 2 Ch. 146. And although the lease contained a reservation of a right to the lessor to build notwithstanding lights were thereby obstructed. *Mitchell v. Cantrill*, 37 Ch. D. 56, C. A. *Secus*, when there is an express contract in the lease that he might so build. *Haynes v. King*, (1893) 3 Ch. 439. Sect. 3 was held by Chitty, J., to apply only to a dwelling-house, workshop, or some other building of an analogous nature, and not, therefore, to the structure described in *Harris v. De Pinna*, cited *post*, p. 818; the C. A. in this case avoided expressing an opinion on the point. 33 Ch. D. 238. In *Clifford v. Holt*, (1899) 1 Ch. 698, Kekewich, J., held it to apply to a greenhouse.

As it is a principle of law, "that no man shall derogate from his own grant," a right to the access of light may be applied from a simple conveyance of real property. Hence, the owner of a house and of land adjoining, cannot after selling the house obstruct its lights, by building on the land. *Palmer v. Fletcher*, 1 Lev. 122. This restriction extends to those who claim under the grantor; *Coutts v. Gorham*, M. & M. 396; *Swansborough v. Coventry*, 2 Moo. & Sc. 362; 9 Bing. 305; *Wilson v. Queen's Club*, (1891) 3 Ch. 522; unless they claim under a title legal or equitable prior to the grant. *Beddington v. Attlee*, 35 Ch. D. 317; but it does not extend to land afterwards acquired by the grantor, even though he was lessee thereof for a term of years at the time of the grant. *Booth v. Alcock*, L. R., 8 Ch. 663; see *Davis v. Town*

Properties Investment Cor., (1903) 1 Ch. 797, C. A. On the same principle, where the house and land belong to the same owner, if he sell the land unconditionally, he retains no right to access of light to the house. *Tenant v. Goldwin*, 2 Ld. Raym. 1089, 1093, *per* Holt, C. J.; *White v. Bass*, 7 H. & N. 722; 31 L. J., Ex. 283; *Ellis v. Manchester Carriage Co.*, 2 C. P. D. 13. See also *Teebay v. Manchester, &c. Ry. Co.*, cited *post*, p. 826. Nor has a subsequent purchaser of the house such a right. *Wheeldon v. Burrows*, 12 Ch. D. 31, C. A.; *Ray v. Hazeldine*, (1904) 2 Ch. 17. But where P., the owner of a dwelling-house and the adjoining land, sells the house to A., and the land to B., under contemporaneous conveyances, of which both A. and B. have notice, B. cannot build on the land, so as to obstruct the lights of the house. *Allen v. Taylor*, 16 Ch. D. 355. So where A. and B. take the house and land respectively by devise under P.'s will. *Phillips v. Lou*, (1892) 1 Ch. 47. In the case of buildings, B. and E., let by the same lessor under contemporaneous leases, and separately mortgaged, a reasonable implication may arise from the leases, mortgages and plans, that the mortgagee of E. is precluded from interfering with the lights of B., although not ancient. *Russell v. Watts*, 10 Ap. Ca. 590, D. P. So, where a row of unfinished buildings, was put up for sale, by auction in lots, and a plan of the buildings was produced at the sale, which each purchaser was bound by written conditions to conform to, in completing them, it was held that the purchaser of one, could not afterwards make an addition to his house, so as to obstruct the windows of an adjoining one; and this without reference to priority of completion. *Compton v. Richards*, 1 Price, 27. But the mere grant of a house to A. does not confer on A. the right to more light than is consistent with the intention to be implied from the circumstances at that time existing and known to A. *Birmingham, &c. Banking Co. v. Ross*, 38 Ch. D. 295, C. A. (explained in *Broomfield v. Williams*, (1897) 1 Ch. 602, C. A.); *Quicke v. Chapman*, (1903) 1 Ch. 659, C. A. And this rule is not affected by the Conveyancing Act, 1881, 44 & 45 V. c. 41, s. 6 (2), by which the conveyance of land made after Dec. 31st, 1881, having houses or other buildings thereon, shall be deemed to include and operate to convey all lights, enjoyed with, or reputed as appurtenant to the houses or other buildings conveyed. *S. C. Accord.* *Burrows v. Lang*, (1901) 2 Ch. 502. See further as to implied grants and reservations of easements, *Glave v. Harding*, 27 L. J., Ex. 286, *post*, pp. 826, 827. As to obstruction by a tenant, see *Riviere v. Bouver*, Ry. & M. 24. Where a lease of buildings, B., mortgaged to P., is determined by surrender, forfeiture or otherwise, the lessor has the same rights to light in respect of B. as P. would have had if the lease had still subsisted. *Russell v. Watts*, *supra*.

The words "actually enjoyed," in sect. 3, are satisfied, where a house is structurally complete, so that light and air pass through the window openings, although the window sashes are not filled, nor the floors laid till afterwards, so that there could not be personal occupation. *Collis v. Laugher*, (1894) 3 Ch. 659, following *Courtauld v. Legh*, L. R., 4 Ex. 126. So, although the windows of a warehouse are ordinarily closed with shutters which are opened when the owner pleases to admit the light. *Cooper v. Straker*, 40 Ch. D. 21. See also *Smith v. Baxter*, *post*, p. 819. This section has been held to be retrospective. *Simper v. Foley*, *ante*, p. 817. As to the amount of light to which the occupier of the house, &c., is entitled, *vide post*, p. 821.

To acquire the right, the light must come for the prescribed period through the same definite access. *Harris v. De Pinna*, 33 Ch. D. 238, C. A. The use of an open area, as a timber-yard, or sawpit, for 20 years, does not prevent the adjoining owner from building on his land, so as to obstruct the light and air. *Roberts v. Macord*, 1 M. & Rob. 230; *accord.* *Potts v. Smith*, L. R., 6 Eq. 311.

An enjoyment for 19 years and 330 days, followed by an interruption of 35 days, just before the commencement of the suit, has been held sufficient to establish the right. *Flight v. Thomas*, 11 Ad. & E. 688, Ex. Ch.; 8 Cl. & F. 231. The effect of this decision is, that an enjoyment for 19 years and a fraction, and then an interruption, acquiesced in for the rest of the year, make up together 20 years' enjoyment, and that when an easement has been once enjoyed as of right, such enjoyment must be taken, for the purposes of the act to continue, though interrupted, if the interruption be not acquiesced in for a year. *Per* Erle, J., and *Ld.* Campbell, C.J., in *Eaton v. Swansea Waterworks*, 17 Q. B. 267, 272.

In *Cooper v. Hubbuck*, 12 C. B., N. S. 456; 31 L. J., C. P. 323, the lights, claimed by the plaintiff, were stated to have been enjoyed for the period of 20 years next before a chancery suit, between the same parties and upon the same question, and also for the period of 20 years next before a previous action at common law, relating to the same question; it was held (*Williams, J., diss.*), that this enjoyment was sufficient, and that sect. 4 of the Act did not require that the 20 years should be those immediately preceding the pending suit. It is observable that the words "claiming right thereto," used in sects. 1 & 2 (*post*, pp. 823, 827), are, perhaps designedly, omitted in sect. 3; see 11 Ad. & E. 695. An absolute right may be gained by the enjoyment of light for 20 years, under permission orally granted, and an agreement to pay an annual acknowledgment. *London, Mayor of v. Pewterers' Co.*, 2 M. & Rob. 409. Payment of rent, under an oral agreement for the enjoyment of the lights by the occupier, is not an "interruption" within sect. 3; there must be a discontinuance of the enjoyment, by reason of some obstruction. *Plasterers' Co. v. Parish Clerks' Co.*, 6 Exch. 630; 20 L. J., Ex. 362, Ex. Ch. But this does not decide, that an enjoyment on those terms would be sufficient to confer a right, or that such payment is inadmissible to defeat the claim, for no such point was raised on the bill of exceptions. As to this, see *Tickle v. Brown*, and *Gardner v. Hodgson's, &c. Brewery Co.*, cited *post*, p. 829. And where the plaintiff enjoyed windows under a memorandum, signed by the plaintiff only, stating that he did so by the defendant's consent, that he would close them at the defendant's request, and pay 6d. a year in respect thereof: this was paid to within 20 years before action; the enjoyment was held to be within the exception in sect. 3. *Bewley v. Atkinson*, 13 Ca. D. 283, C. A.; *Easton v. Isted*, (1903) 1 Ch. 405, C. A.

Such an interruption only, as is described in sect. 4, will prevent the periods from running. *Glover v. Coleman*, L. R. 10 C. P. 108. It must be an adverse obstruction and not a mere discontinuance of user. *Smith v. Baxter, infra*. An interruption which is from time to time removed is not within sect. 4. *Presland v. Bingham*, 41 Ch. D. 268, C. A. Whether the interruption has been acquiesced in, by the owner of the dominant tenement, is a question for the jury; complaints made by the plaintiff to the defendant of the obstruction, are evidence of the absence of acquiescence. *Glover v. Coleman, supra*. It seems, that if it appear from the plaintiff's evidence there has been an obstruction of a permanent character, the plaintiff must prove that it did not last for a year, but if the obstruction were of a fluctuating and temporary character, the defendant must prove that it lasted for a year. *Presland v. Bingham, supra, per* Cotton and Lindley, L.JJ. "Non user which would not be sufficient to establish an abandonment of a right acquired," *vide post*, p. 820, "may be sufficient to prevent the acquisition of that right under the Act." *Smith v. Baxter*, (1900) 2 Ch. 138, 146. As to the notice of the interruption required by sect. 4, see *Seldon v. Bank of Bolton*, 19 Ch. D. 462.

The use of light is put by the Act on the footing of other easements, as to the effect of unity of possession, and is not established by 20 years' enjoyment unless enjoyed *as an easement*; the right therefore is not gained, where the

owner of the house has also held the adjoining land, which it overlooks, under a yearly tenancy. *Harbidge v. Warwick*, 3 Exch. 552; *Ladyman v. Grave*, *infra*. But the union of the ownership of dominant and servient tenements, for different estates, merely suspends the running of the 20 years, so long as the union of ownership continues. *Ladyman v. Grave*, L. R. 6 Ch. 763, 768, *per* Ld. Hatherley, C.; and *vide post*, p. 836. So, when the right has been once acquired, the like union does not extinguish the right, but merely suspends it, and upon a severance of the ownership the easement revives. *Simper v. Foley*, 2 J. & H. 555; *Ivimey v. Stocker*, L. R., 1 Ch. 396, 408; *Aynsley v. Glover*, L. R., 10 Ch. 283. And see cases cited *post*, p. 836.

The Metropolitan Building Act, 1855 (18 & 19 V. c. 122), s. 83 (6), which gives a right to the building owner, "to raise any party structure permitted by that act to be raised" . . . "upon condition of making good all damage occasioned thereby, to the adjoining premises," does not enable a person, to build a party wall so as to darken ancient lights. *Crofts v. Haldane*, L. R., 2 Q. B. 194; following *Wells v. Ody*, 1 M. & W. 452, decided under 14 G. 3, s. 78. And the custom of London, respecting the heightening of walls, is controlled by the stat. 2 & 3 W. 4, c. 71. *Merchant Taylors' Co. v. Truscott*, 11 Exch. 855; 25 L. J., Ex. 173, Ex. Ch.; *Yates v. Jack*, L. R., 1 Ch. 295.

The right to access of air stands on a different footing to that of access of light, and such right over the general unlimited service of land, cannot be acquired by mere enjoyment. *Bryant v. Lefever*, 4 C. P. D. 172, 174, 180, *per* Cotton, L.J. Thus a right to the access of air, to a chimney of the plaintiff's house; S. C.; or to the plaintiff's windmill, *Webb v. Bird*, 13 C. B., N. S. 841; 31 L. J., C. P. 335, Ex. Ch.; or to a structure substantially consisting only of floors and a roof, with open ends and sides, used for stacking and drying timber; *Harris v. De Pinna*, 33 Ch. D., 238, C. A.; cannot be acquired under 2 & 3 W. 4, c. 71, s. 2. It may, however, be acquired by grant. *Aldin v. Latimer, &c. & Co.*, (1894) 2 Ch. 437. And access of air to a building through a defined channel may be acquired by user, with knowledge of the owners of the channel, and the right be proved by lost grant. *Bass v. Gregory*, 25 Q. B. D. 481.

The mere fact of there being windows in a house, overlooking and adjoining land bought by A., is not constructive notice to A., of an agreement giving a right to the access of light to them. *Allen v. Seckham*, 11 Ch. D. 790, C. A.

Right to light and air, how lost.] An ancient window, bricked up for 20 years, loses its privilege. *Lawrence v. Obee*, 3 Camp. 514. And the privilege may be released by disuse, for even a less time; nor is it so much length of time, as the nature of the act done, or the acquiescence by the grantee of the easement, and his intention, that is material, in considering whether the right has been abandoned. *R. v. Chorley*, 12 Q. B. 515; see *Crossley, &c. v. Lightowler*, L. R., 3 Eq. 279; L. R., 2 Ch. 478; *James v. Stevenson*, (1893) A. C. 162, J. C. Thus, where the plaintiff pulled down a wall, with an ancient window in it, and rebuilt a blank wall, and 17 years afterwards re-opened a window, in the old place, it was held that the window had lost his privilege, there being no apparent intention of resuming the old right when the wall was rebuilt. *Moore v. Rawson*, 3 B. & C. 332. In this case the defendant had, *in the meantime*, erected a building which would have been an obstruction of the old light; but it does not appear that any such act was necessary in order to prevent a resumption of the old right. See Gale on Easements, 7th ed., pp. 490 *et seq.* A.'s house had ancient windows, which A.'s predecessor had kept blocked up for 20 years; B. bought the next land for building; A. thereupon re-opened his windows, and B. obstructed them; in an action by A. against B., the jury were directed, that the right to the light once gained, continued till lost, and that they should

find for the plaintiff, unless they thought his predecessor had shown an intention of permanently abandoning his lights, or they had been so kept closed as to lead the defendant to alter his position in the reasonable belief that the right had been abandoned. *Stokoe v. Singers*, 8 E. & B. 31; 26 L. J., Q. B. 257; see *Cook v. Bath, Mayor, &c. of*, L. R., 6 Eq. 177, and *Smith v. Baxter*, ante, p. 819. The extent of the right is measured by the size and position of the window or aperture of the house through which the light has passed for 20 years, and is not affected by advancing or setting back the plane of the window. *Scott v. Pape*, 31 Ch. D. 554, C. A., overruling *Blanchard v. Bridges*, 4 Ad. & E. 176. So, if an old window be enlarged, no part of the space occupied by the old one can be obstructed; *Chandler v. Thompson*, 3 Camp. 80; although the enlargement of the window creates no increased rights. *Cooper v. Hubbuck*, 30 Beav. 160; 31 L. J., Ch. 123. In *Turner v. Spooner*, 1 Dr. & Sm. 467; 30 L. J., Ch. 801, two ancient windows had been modernized, by removing the old casements and substituting new ones of a lighter construction, without extending the aperture, occupied by their frames; this was held to give the defendant no right to obstruct them. So, where a dormer window was converted into a skylight. *National Prov., &c. Insur. Co. v. Prudential Assur. Co.*, 6 Ch. D. 757. Or a new window is constructed, outside an ancient one, the position of which is unchanged. *Burnes v. Louch*, 4 Q. B. D. 494. The plaintiff opened several new windows, and enlarged ancient ones. The defendant built a wall which obstructed both the old and new lights; the plaintiff then restored his windows to their original state; it was held, that the defendant was not at any time at liberty to obstruct the old windows, although without so doing, he could not obstruct the new ones, for the construction of the latter had not affected the plaintiff's rights in respect of the old windows. *Jones v. Tupling*, 11 H. L. C. 290; 20 C. B., N. S. 166; 35 L. J., C. P. 342. No right is, however, preserved for any new window in the same plane as the ancient one, which does not substantially correspond with an ancient one. *Hutchinson v. Copestake*, 9 C. B., N. S. 863; 31 L. J., C. P. 19, Ex. Ch.; *Newson v. Pender*, 27 Ch. D. 43, per Baggallay and Cotton, L.JJ. The erection by the plaintiff of an obstruction, which partly blocks up his ancient light does not authorize the interference by the defendant with the remaining light. *Staught v. Burn*, L. R., 5 Ch. 153. The right may be lost by a change in the dominant tenement which increases the burthen on the servient tenement. *Ankerson v. Connelly*, (1906) 2 Ch. 544; (1907) 1 Ch. 678, C. A.

Proof of obstruction—Damages—Injunction.] To constitute an actionable obstruction, it has been decided, after many conflicting decisions, that there must be such a substantial diminution of light as to render the premises sensibly less fit for the purposes of business or occupation, i.e., the obstruction must be a nuisance. *Colls v. Home & Colonial Stores*, (1904) A. C. 179, D. P., approving *Back v. Stacey*, 2 C. & P. 466; *Parker v. Smith*, 5 C. & P. 438; *Wells v. Ody*, 7 C. & P. 410; *Clarke v. Clark*, L. R., 1 Ch. 16; and *Kelk v. Pearson*, L. R., 6 Ch. 809. See also *Kine v. Jolly*, (1905) 1 Ch. 480, C. A.; affirm. *sub nom. Jolly v. Kine*, (1907) A. C. 1, D. P. The test in general is whether enough light is left for comfortable use and enjoyment of the house according to the ordinary requirements of mankind. *Higgins v. Betts*, (1905) 2 Ch. 210. The right to a special amount of light necessary for a particular business cannot be acquired by 20 years' enjoyment even with the knowledge of the owner of the servient tenement. *Aubler v. Gordon*, (1905) 1 K. B. 417. As to the effect of clearances made in the neighbourhood by other parties shortly before the obstruction, by which the plaintiff acquired more light, than the obstruction would cut off, see *Dyers' Co. v. King*, L. R., 9 Eq. 438, and (1904) A. C. 210, 211, per *Ld. Lindley*.

Where the obstruction is continuing, damages are now assessed down to the time of assessment. Rules, 1883, O. xxxvi. r. 58, *ante*, pp. 295, 771. The plaintiff may bring fresh actions, as long as the obstruction lasts, and the previous recovery for the same obstruction is no bar. *Shadwell v. Hutchinsons*, 2 B. & Ad. 97. If the obstruction be not removed, the jury may in the second action give substantial damages. *Baltishill v. Reed*, 18 C. B. 696; 25 L. J., C. P. 292. So, the jury may consider the defendant's conduct, and if he have acted with a high hand may, even in the first action, give substantial damages. *Thompson v. Hill*, L. R., 5 C. P. 564.

In order to obtain an injunction, the plaintiff must prove substantial damage; *Kino v. Rudkin*, 6 Ch. D. 160; and it is, generally speaking, a *fair working rule*, that where the windows of a house, in the street of a town, are unobstructed, as to 45°, that the obstruction of light from them is not substantial, especially if there be a good light from other directions as well. *City of London Brewery Co. v. Tennant*, L. R., 9 Ch. 212, 220, *per* Ld. Selborne, C.; *Colls v. Home & Colonial Stores*, (1904) A. C. 204, 210, *per* Lds. Davey and Lindley. This is not, however, a *rule of law*, and the inference may be rebutted by proving substantial damage. S. CC.; *Parker v. First Avenue Hotel Co.*, 24 Ch. D. 282, C. A.; *Ecclesiastical Commissioners v. Kino*, 14 Ch. D. 213, C. A. Where both ancient and new lights are obstructed, the right to an injunction follows the rule laid down in *Jones v. Tipling*, *ante*, p. 821; *Staight v. Burn*, L. R., 5 Ch. 163; *Aynsley v. Glover*, L. R., 18 Eq. 544; L. R., 10 Ch. 283. Where the building in which the ancient lights were, has been pulled down, for the purpose of rebuilding, without any intention of abandonment, an injunction may be granted to prevent the erection of any structure that would obscure the light when restored. *Ecclesiastical Commissioners v. Kino*, *supra*. See further as to the right to injunction, *Smith v. Smith*, L. R., 20 Eq. 500; *Aynsley v. Glover*, *supra*; *National Provincial, &c. Insur. Co. v. Prudential Assur. Co.*, 6 Ch. D. 757; *Krehl v. Burrell*, 7 Ch. D. 551; 11 Ch. D. 146, C. A. (the case of a right of way); *Colls v. Home & Colonial Stores*, (1904) A. C. 192, 212, *per* Lds. Macnaghten and Lindley; and *Kine v. Jolly*, cited *ante*, p. 772. An injunction cannot be granted to prevent a railway company from obstructing the windows of a new house, overlooking their land, so as to prevent their acquiring an easement over it. *Bonner v. Gt. W. Ry.*, 24 Ch. D. 1, C. A. Where the plaintiff died before trial, it was held that his devisee could, on equitable principles, continue the proceedings and obtain an injunction. *Jones v. Simes*, 43 Ch. D. 607.

An injunction will be granted on the ground of diminution of air "only in very rare and special cases involving danger to health, or at least something very nearly approaching it." *City of London Brewery Co. v. Tennant*, L. R., 9 Ch. 212, 221, *per* Ld. Selborne, C. It will, however, be granted to restrain interference with the flow of air through a defined channel. *Bass v. Gregory*, *ante*, p. 820.

As to granting damages instead of an injunction, see *Martin v. Price*, (1894) 1 Ch. 276, C. A.; *Jordeson v. Sutton, &c. Gas Co.*, (1899) 2 Ch. 217, C. A., and cases cited *ante*, pp. 771, 772.

ACTION FOR DISTURBANCE OF COMMON.

In an action for disturbance of common, the statement of claim states the plaintiff's right of common over the locus, either as appurtenant to a messuage of which the plaintiff is possessed, or in gross; the disturbance by the defendant; and the damage.

Proof of right of common.] With regard to the evidence allowed by statute, it is enacted by the Prescription Act, 1832 (2 & 3 W. 4, c. 71), s. 1, that no claim which may be lawfully made at common law by custom, prescription, or grant, to any right of common, or other profit or benefit to be taken and enjoyed *from or upon any land of another*, except tithes, rent, and services, shall, where such right shall have been actually enjoyed by any person claiming right thereto, without interruption for the full period of 30 years, be defeated or destroyed by showing only that such right, &c., was first enjoyed at any time prior to such period; but such claim may be defeated in any other way by which it is now liable to be defeated; and when such right, &c., shall have been so enjoyed for 60 years, it shall be deemed absolute and indefeasible, unless it shall appear that it was taken and enjoyed by some consent or agreement expressly made or given for that purpose, by deed or writing. The section applies to land of the Crown, and of the duchies of Lancaster and Cornwall.

This Act does not apply to rights in gross. *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 687; 34 L. J., C. P. 309. See also *Mounsey v. Ismay*, 3 H. & C. 486; 34 L. J., Ex. 52.

The plaintiff may prove his claim, either at common law, or under the stat. 2 & 3 W. 4, c. 71. At common law the proof is by express grant, custom, or prescription. An ancient grant is, of course, admissible, if produced from the proper custody. A customary or prescriptive title is generally proved by usage. And instances of such an usage, although comparatively modern, are, if unopposed by other evidence, conclusive. *R. v. Hoyte*, 6 T. R. 430. Where this evidence cannot be procured, a right of common appurtenant may be proved by reputation. See *ante*, pp. 48 *et seq.* As to the presumption of a legal origin for the right, see *Johnson v. Barnes*, L. R., 7 C. P. 594; cited *ante*, p. 39.

A right of common of pasture as appurtenant to a certain close may be for cattle without number, or for a certain number only; where without number, it is restrained to cattle levant and couchant upon the close. *Morley v. Clifford*, 20 Ch. D. 753. The expression "levant and couchant," is a measure of number, and implies within it, that the number of cattle, which are alleged to have used the common, is such as the winter eatage of the close, together with the hay and other produce, obtained from it during the summer, is capable of maintaining. *Carr v. Lambert*, 3 H. & C. 499, 506; 34 L. J., Ex. 66, 68; L. R., 1 Ex. 168, 176, Ex. Ch.; *Johnson v. Barnes*, L. R., 7 C. P. 592; L. R., 8 C. P. 527, Ex. Ch.; 1 Wms. Saund. 346 *d*, (2) and (*l*). See also *Baylis v. Tyssen-Amhurst*, 6 Ch. D. 500, where a right of common was claimed over lammas lands. To prove a prescription for common by cause of vicinage, it is not enough to show the mere contiguity of the districts without any fence, and that cattle often strayed from one to the other, and were driven back; mutual acquiescence must be shown. *Clarke v. Tinker*, 10 Q. B. 604; see also *Sewers, Commissioners of v. Glasse*, L. R., 19 Eq. 134.

Sects. 4, 5, and 6 have been already in part cited, *ante*, p. 816.

By sect. 7, the time during which a person, otherwise capable of resisting a claim, shall have been an infant, idiot, non-compos, covert, or tenant for life, or during which any action or suit shall have been pending and shall have been diligently prosecuted until abatement by death, shall be excluded in the competition of the above periods, except where the right is declared to be absolute and indefeasible. The cases on this section will be found *post*, pp. 830, 831.

Where a *profit à prendre* has been enjoyed for 60 years, as of right, it is within sect. 1, if a claim thereto *could* arise by prescription, custom, or grant, and it is immaterial on what ground the claim was, in fact, made. *De la*

Warr, Earl v. Miles, 17 Ch. D. 535, C. A. As to the meaning of the expression "as of right," *vide* S. C., and *post*, pp. 828, 829.

In order to prove a user under the statute, it is not necessary to show that it was exercised without any intermission whatever. In *Carr v. Foster*, 3 Q. B. 581, proof that the tenant of a farm had exercised commonable rights, for nearly 40 years, was given; but it appeared that about 18 years back the owner had occupied the farm for two years, and having no cattle, made no use of the common: held, that there was good evidence of the 30 years' enjoyment required by the Act. In *Carr v. Lambert*, *ante*, p. 823, a right of common of pasture for cattle levant and couchant, upon a certain close as appurtenant thereto, was held to have been proved, by evidence that cattle housed on the close had, for 30 years, been turned on the common, though they had not actually been fed from the produce of the close, which was not then cultivated in a manner suitable for the support of cattle. See *De la Warr, Earl v. Miles*, 17 Ch. D. 535, 593, 600, C. A., and *post*, p. 830. The plaintiff need not prove his title to the same extent as set out in the statement of claim; for the disturbance is the gist of the action, and the title is only inducement. B. N. P. 75, 76; 1 Wms. Saund. 345, 346 (2). But though the right proved may be larger than the right alleged, it ought to be a right which includes the one alleged. *Bailey v. Appleyard*, 8 Ad. & E. 161. An allegation of right of common for all the plaintiff's cattle, levant and couchant, is supported in evidence, although the common is not sufficient to feed all the cattle for any length of time. *Willis v. Ward*, 2 Chitty, 297. Where the plaintiff claimed a right of common for all his commonable cattle, and the proof was that he had turned on all the cattle he had kept, but had never kept any sheep, it was held that this was evidence of a right for *all* commonable cattle to be left to the consideration of the jury. *Manifold v. Pennington*, 4 B. & C. 161.

A liberty to hunt, hawk, fish, and fowl, is within sect. 1 of the Prescription Act, and may be exercised by servants. *Wickham v. Hawker*, 7 M. & W. 63. See *Bland v. Lipscombe*, 4 E. & B. 713 (c); *Bruce v. Helliwell*, 5 H. & N. 609; 29 L. J. Ex. 297; *Ewart v. Graham*, 7 H. L. C. 331; 29 L. J., Ex. 88; *Leconfield, Ltd. v. Dixon*, L. R., 3 Ex. 30, Ex. Ch.; *Sowerby v. Smith*, L. R., 9 C. P. 524, Ex. Ch.; *Devonshire, Duke of v. O'Connor*, 24 Q. B. D. 468, C. A.

The fact that some of the tenants of a manor have yielded to the lord's attempt to stop a user of a common, is not an interruption of the right within sect. 4, so as to bar the rights of the freeholders, who, as a body, have not yielded to the lord's claim. *Warrick v. Queen's College, Oxford*, L. R. 10 Eq. 105. See *Glover v. Coleman*, L. R., 10 C. P. 108, *ante*, p. 819.

[*Proof of disturbance by the defendant.*] This evidence is proper on a defence which denies the wrongful act, and not the right. The action is maintainable against another commoner, as well as against a stranger; *Atkinson v. Teasdale*, 2 W. Bl. 817; although the plaintiff himself has been guilty of a surcharge. *Hobson v. Todd*, 4 T. R. 71. But, in an action against the lord, the plaintiff must allege a surcharge, and (if denied) prove it by showing that there is not a sufficiency of common left for him. *Smith v. Feverel*, 2 Mod. 6; 1 Wms. Saund. 346 *b* (*in notis*). Where the lord has licensed a third person to put cattle on the common, the plaintiff may declare against him as a stranger for a disturbance generally; *Id.*; *Hobson v. Todd*, 4 T. R. 73; and it will, it seems, lie upon the defendant to prove the licence, and that he has not exceeded it, and has left sufficient common for the plaintiff. 1 Wms. Saund, *supra*. But, this defence must be pleaded specially.

Damage.] In an action against a stranger, the smallest damage, as carrying away the dung from the common, is sufficient to maintain the action. *Pindar v. Wadsworth*, 2 East, 154. And in an action against another commoner for surcharging, it is sufficient to prove that the defendant put on the common more cattle than he had a right to do, without proving any specific damage. *Hobson v. Todd*, *ante*, p. 824.

Where the disturbance is continuing, damages are now assessed down to the time of assessment: Rules, 1883, O. xxxvi., r. 58, *ante*, pp. 295, 771.

Defence.

The defendant may show, under a proper statement of defence, that the common has been enclosed and held in severalty, adversely, for upwards of 20 years, which is a bar to the entry of the commoner. *Hawke v. Bacon*, 2 Taunt. 156. Or he may show an extinction by unity of possession, *post*, p. 836; or by inclosure for over 20 years; *Tupley v. Wainwright*, 5 B. & Ad. 395; or by approvement, leaving sufficient common to those entitled to it; *Arlett v. Ellis*, 7 B. & C. 346; *Robinson v. Duleep Singh*, 11 Ch. D. 798, C. A. As to extinguishment by enfranchisement of the dominant tenement, see *Baring v. Abingdon*, (1892) 2 Ch. 374. The sufficiency is not measured by the present exercise by the commoners of their right. *Robertson v. Hartopp*, 43 Ch. D. 484, C. A., commenting on *Lascelles v. Ld. Onslow*, 2 Q. B. D. 433; see also cases cited *ante*, p. 824. The lord of the manor may take gravel, marl, loam and sub-soil of the waste for his own use, or for sale, if he do not infringe on the rights of the commoners, the onus of proving which lies on them. *Hall v. Byron*, 4 Ch. D. 667. Such matters must now in general be pleaded specially, as they would, if not so pleaded, be likely to take the plaintiff by surprise. See Rules, 1883, O. xix., r. 15, *ante*, p. 309. Where the claim is founded on 30 years' user, the defendant may show that the dominant tenement was land allotted and enclosed 40 years ago under an inclosure act, that the land over which the right was claimed was and is part of the Crown demesne, and that at that time, and ever since, the Crown was disabled by statute from making any such grant of common. And *quære* whether the Prescription Act applies to land over which there was, during the time of enjoyment, a statutable prohibition to make any such grant? *Mill v. New Forest, Commissioners of*, 18 C. B. 60; 25 L. J., C. P. 212; and see Wingrove Cooke on Inclosures and Rights of Common, 4th ed. 92.

ACTION FOR DISTURBANCE OF WAY.

In an action for the disturbance of a private way, the statement of claim usually alleges the possession of certain premises, a right of way appurtenant thereto, and the disturbance of it by the defendant. It cannot, in general, be brought by a reversioner, unless the disturbance be of a permanent character, such as an obstruction of the way by a wall, posts, &c., so as to threaten an injury to the freehold. See *Kidgill v. Moor*, 9 C. B. 364; 19 L. J., C. P. 177; and the cases there cited. *Palk v. Shimmer*, 18 Q. B. 568; 22 L. J., Q. B. 27; and further, *ante*, pp. 759 *et seq.* As to obstruction of a churchway, see *Batten v. Gedye*, 41 Ch. D. 507.

Right of way, how proved.] The modes of proving a right of way are (1) by express grant, (2) by user, (3) by necessity, (4) by the Act of Inclosure Commissioners.

When the user has not continued down to the commencement of the suit, then the right must be claimed by prescription at common law, or by a grant alleged to have existed, but now to be lost; for in such a case the claim under the Prescription Act, 1832, 2 & 3 W. 4, c. 71, could not be supported. See Bullen & Leake on Pleading, 3rd ed., p. 811 (*b*); 6th ed., p. 949 (*a*).

The *termini* of the way, as stated in the claim must be proved; but a variance in this respect would be at once amended if no injustice were thereby done. *Vide* pp. 291 *et seq.*

If the claim allege the way to be enjoyed “*by reason*” of a message, it will not be supported by proof of a right independent of it. *Fentiman v. Smith*, 4 East, 107; *Barnes v. Ward*, *ante*, p. 763. The allegation may generally be struck out, or otherwise amended. Hearsay evidence is not admissible to prove a private way. See *ante*, p. 48.

A right of way along the bank of a river may be appendant or appurtenant to a right of fishing therein. *Hanbury v. Jenkins*, (1901) 2 Ch. 401, 422, 423.

Right of way, how proved—by express grant.] The proof of a right of way by express grant is, of course, a question more of construction than of evidence. See *Clifford v. Hoare*, L. R., 9 C. P. 362; *Cannon v. Villars*, 8 Ch. D. 415; *Baxendale v. N. Lambeth, &c. Club*, (1902) 2 Ch. 427. As to the construction to be given to general words, see *Brett v. Clowser*, 5 C. P. D. 376, and cases there cited. By the Conveyancing, &c. Act, 1881, 44 & 45 V. c. 41, s. 6, conveyances of land made after Dec. 31st, 1881, are to be deemed to include certain general words, unless expressly excluded; see hereon *Broomfield v. Williams*, (1897) 1 Ch. 602, C. A.; *Quicke v. Chapman*, (1903) 1 Ch. 659, C. A.; *International Tea Stores v. Hobbs*, (1903) 2 Ch. 165. The grant may arise by estoppel; as where land demised is described as bounded by “newly-made streets,” which are set out in an indorsed plan, and the lessee is bound to build houses on the land, and “to kerb the causeways adjoining the said land,” the lessor and his assigns are estopped from denying a right of way along the street. *Espley v. Wilkes*, L. R., 7 Ex. 298. See also *Mellor v. Walmsley*, (1905) 2 Ch. 164, C. A. It is to be observed that a grant of a right of way in gross may be made good against subsequent assignees of the servient tenement, although covenants to keep it in repair, &c., cannot, as not running with the land. *Spencer’s case*, 1 Smith’s Lead. Cas., *in notis*. On a severance of the dominant tenement the right of way is also severable and apportionable. *Newcomen v. Coulson*, 5 Ch. D. 133, C. A. The grantee of a private way must repair it, if necessary, himself, and the owner of the servient tenement is not bound to do so, unless he has expressly so bound himself. *Pomfret v. Ricraft*, 1 Wms. Saund. 322 *b*.; *Ingram v. Morecraft*, 33 Beav. 49. But the grantee is not compellable to repair it. *Duncan v. Louch*, 6 Q. B. 904, 910. Where the agreement for sale of land A., which was between two other plots of the vendor’s land, provided for the right of access over A., but the conveyance conveyed all rights, ways, easements, estates, &c., and contained no reservation of a right of way, any right of access stipulated for, was held to be extinguished. *Teebay v. Manchester, &c. Ry. Co.*, 24 Ch. D. 572. Where however the conveyance also reserved such right of access, the purchaser was held bound to allow it although he had not executed the conveyance. *May v. Belleville*, (1905) 2 Ch. 605.

Right of way, how proved—by implied grant or by necessity.] A right of way by *necessity*, as it is sometimes called, is really a way by implied grant. If A. grant a tenement surrounded by his own land to B., B. is entitled to a right of way to it through the land of the grantor, if such way be absolutely necessary to the enjoyment of what is granted. 1 Wms. Saund. 323 *a*, (6);

Palmer v. Fletcher, 1 Lev. 122; *Staple v. Heydon*, 6 Mod. 3; *Gayford v. Moffatt*, L. R., 4 Ch. 133; *Polden v. Bastard*, L. R., 1 Q. B. 156, 161, Ex. Ch. And where the land conveyed encloses the reserved land there is an implied re-grant to the grantor of a way through it. *Pinnington v. Gulland*, 9 Exch. 1; 22 L. J., Ex. 348. See also *Davies v. Sear*, L. R., 7 Eq. 427. The extent of this right of way re-granted, is limited by the use made of the reserved land, at the time of the grant; *London, Cor. of v. Riggs*, 13 Ch. D. 798; and it seems that the same rule applies where the land granted is surrounded by the grantor's land. S. C., *per* Jessel, M.R. This re-grant is an exception to the general principle, that in the case of a grant there is no re-grant of easements over the land granted: see *Wheeldon v. Burrows*, 12 Ch. D. 31, C. A. But the re-grant only arises in those cases in which the easement is one "without which the property retained cannot be used at all, and not one merely necessary for the reasonable enjoyment of that property." *Union Lighterage Co. v. L. Graving Dock Co.*, (1902) 2 Ch. 573, *per* Stirling, L.J., following S. C. See further as to implied grants, cases cited *post*, p. 833; and as to the user of a way of necessity, *post*, p. 835. As to the mode of ascertaining the way, see *Pearson v. Spencer*, 1 B. & S. 571.

Right of way, how proved—by prescription at common law, or non-existing grant.] Formerly a right of way not claimed by express grant must have been shown to have existed from time immemorial, that is, from the beginning of the reign of Richard I. (A.D. 1189). This is called a claim by prescription at common law, to distinguish it from a different kind of prescription created by statute.

But as it would, in almost all cases, be impossible to show the existence of the right for so long a period, evidence of user for a much shorter period, has been long considered sufficient to support a claim by prescription at common law, if not negatived by showing, as is sometimes possible, that the right came into existence at a later date. This period has been fixed by analogy to the limitation contained in the 21 J. 1, c. 16, at 20 years.

And although the evidence fail to support a claim by prescription at common law, by reason of its appearing that the right originated at a date later than the reign of Richard I., it will be sufficient to support a claim of the same right by lost or non-existing grant. This means a modern express grant, of the existence of which, enjoyment for a period of 20 years is held to be evidence. The grant may now be pleaded without stating date or parties. *Palmer v. Guadagni*, (1906) 2 Ch. 494.

The only reason for claiming a right of this kind by prescription at common law, and also by lost grant, would seem to be a doubt as to the conclusiveness of the presumption in the latter case; *i.e.*, a doubt how far a jury would be at liberty to disregard the evidence of enjoyment and negative the grant. It is probable, however, that if they did so, the court would grant a new trial *toties quoties*. See *Jenkins v. Harvey*, 1 C. M. & R. 894.

For the authorities, see 1 Wms. Saund. 323 *b*, (6); 2 *Id.* 175 *a*, (2); and *ante*, pp. 38 *et seq.*, tit. *Presumption of grants*, &c.

The inhabitants of a parish may by custom have a churchway through the demesne of a manor within the parish. *Brocklebank v. Thompson*, (1903) 2 Ch. 344.

Right of way, how proved—2 & 3 W. 4, c. 71.] By the Prescription Act, 1832, 2 & 3 W. 4, c. 71, s. 2, "no claim which may be lawfully made at the common law by custom, prescription, or grant to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed, or derived upon, over, or from any land or water of our said lord the king, his heirs, or successors, or being parcel of the duchy of Lancaster, or of the duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body

corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of 20 years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of 40 years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed, by some consent or agreement, expressly given or made for that purpose, by deed or writing." By sect. 5, "in all actions upon the case, and other pleadings wherein the party claiming, may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings, wherein before the passing of this act, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof, as of right, by the occupiers of the tenement, in respect whereof the same is claimed, for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter *hereinbefore* mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation." As to the word "*hereinbefore*" in this section, see observations in *Pye v. Mumford*, 11 Q. B. 668, 672, 677.

In addition to the provisions in sects. 4, 6, 7 (recited *ante*, pp. 816, 823), and which apply to ways and other easements, sect. 8 also provides that when land or water, upon, over or from which any way or other *convenient* (*sic*; *qy.* easement, see *Laird v. Briggs*, 19 Ch. D. 33, *per* Jessel, M.R.) water-course or use of water shall have been enjoyed or derived, has been held under any term of life or years, exceeding 3 years, the time of enjoyment during such term shall be excluded in the computation of the period of 40 years, "in case the claim shall within 3 years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof."

The words "or other easement," in sect. 2, are, it seems, applicable to all easements, although not analogous to the contiguous words, "way" or "watercourse." *Angus v. Dalton*, 6 Ap. Ca. 740, 798, *per* Ld. Selborne; *acc. Simpson v. Godmanchester Cor.*, (1897) A. C. 696, 709, *per* Ld. Davey. The decision in *Mounsey v. Ismay*, 3 H. & C. 486; 34 L. J., Ex. 52, in which a contrary opinion was expressed, may be supported on the ground that the easement, which was for all the citizens of a neighbouring city, to run horse races over certain lands yearly on Ascension Day, was claimed on behalf of a body of persons, as to whom prescription was inapplicable; see *Bermondsey Vestry of v. Brown*, *post*, pp. 832, 833. No right can be acquired, under sect. 2, to send noise or vibration over the neighbouring land. *Sturges v. Bridgman*, 11 Ch. D. 852, C. A. The Act does not apply to rights in gross. *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 687; 34 L. J., C. P. 309.

Upon the construction of this statute, the following decisions have occurred:—In order to establish a right of way by enjoyment for 20 years, it

must be proved that the claimant has enjoyed it for the full period required, and that he has done so, "as of right." Therefore if the way shall appear to have been enjoyed by the claimant, not openly, but by stealth, as a trespasser would have done, or if he shall have occasionally asked the permission of the occupier of the land, no title will be so acquired. So, if there has been unity of possession during all or part of the time, for then the claimant will not have enjoyed, as of right, the easement but the soil itself. So, the easement must have been enjoyed without interruption. Again, such claim may be defeated in any other way by which a similar claim by custom, prescription or grant, may be defeasible; and therefore it may be answered by proof of a grant, or of a licence, written or oral, for a limited period, comprising the whole or part of the 20 years, or by proof of the absence or ignorance of the parties interested in opposing the claims, and their agents, during the whole time that it was exercised. See the judgment in *Bright v. Walker*, 1 C. M. & R. 219. So, where in an action of trespass, the defendants pleaded that they had for 20 years as of right and without interruption used a right of way, Parke, B., observed: "The permission asked for and given shows that the occupiers of the closes did not enjoy the way 'as of right;' and also that they did not enjoy it uninterruptedly." *Id.* Lyndhurst, C.B., also said: "The simple issue is, whether there has been a continued enjoyment of the way for 20 years; and any evidence negating the continuance is admissible. Every time that the occupiers ask for leave, they admit that the former licence had expired, and that the continuance of the enjoyment was broken." *Monmouthshire Canal Co. v. Harford*, 1 C. M. & R. 614, 631.

The enjoyment meant by the statute is, "an enjoyment had openly notoriously, without particular leave at the time, by a person claiming to use it without danger of being treated as a trespasser, as a matter of right whether strictly legal by prescription and adverse user, or by deed conferring the right; or, though not strictly legal, yet lawful to the extent of excusing a trespass as by a consent or agreement in writing not under seal, in case of a plea for 40 years, or by such writing, or parol consent, or agreement, contract, or licence, in case of a plea for 20 years." *Per Cur. Tickle v. Brown*, 4 Ad. & E. 369, 382, 383. Thus an annual payment for the use of the way, paid under an agreement made within 40 years before action, will defeat an enjoyment for that period, by negating its being "as of right." S. C. So will payment for the user of the way for more than 40 years. *Gardner v. Hodgson's, &c. Brewery Co.*, (1901) 2 Ch. 198; (1903) A. C. 229, D. P. So will proof of leave and licence, applied for and granted within the 40 years. *Beasley v. Clarke*, 2 N. C. 705. The above principles are usually summarized in the phrase that the acts of enjoyment must be *nec per vim, nec clam, nec precario*. Co. Litt. 114 a, citing Bracton 222 b; *Burrows v. Lang*, (1901) 2 Ch. 502, 511. See further, *Eaton v. Swansea Waterworks*, 17 Q. B. 267, 275; 20 L. J., Q. B. 485, *per* Erle, J.; *Gaved v. Martin*, 19 C. B., N. S. 732, 743; 34 L. J., C. P. 353, 357, *per* *Id.* Proof that the plaintiff, before the commencement of the period, held the right under a lease, is evidence from which the jury may, if they think proper, infer a permissive enjoyment after its expiration. *Clay v. Shackeray*, 2 M. & Rob. 244. See also *Chamber Colliery Co. v. Hopwood*, 32 Ch. D. 549, C. A., and *Tone v. Preston*, 24 Ch. D. 739. Unity of possession disproves the enjoyment of the easement as such. *Onley v. Gardiner*, 4 M. & W. 496; *Clayton v. Corby*, 2 Q. B. 813; *Winship v. Hudspeth*, 10 Exch. 5; 23 L. J., Ex. 268; *Damper v. Bassett*, (1901) 2 Ch. 350. For this reason, a tenant of land cannot acquire, by prescription, an easement appurtenant to such land, over other land belonging to his landlord, for the occupation of the tenant is the occupation of the landlord. *Gayford v. Moffatt*, L. R., 4 Ch. 133. Where the easement has been

enjoyed *without the knowledge of either party*, the user will not, as required by the statute, be under a claim of right. See *Partridge v. Scott*, 3 M. & W. 220, cited *ante*, p. 814.

An enjoyment for 50 years down to within a few years before action brought, when it ceased, will not establish a right of way under this statute. *Parker v. Mitchell*, 11 Ad. & E. 788; *Lowe v. Carpenter*, 6 Exch. 825; 20 L. J., Ex. 374. So, where the user was at intervals of 12 years, and the last user, but one, was 12 years before action, the statute did not apply. *Hollins v. Verney*, 13 Q. B. D. 304, C. A. Although, however, non-user for more than a year is *prima facie* fatal to the right, yet it may be so explained as to warrant a jury in finding an actual enjoyment for the statutory period, at whatever part of that period the non-user may occur. S. C. *Id.* 313, 314, C. A. Thus the non-user may be explained by the circumstance of the claimant not having any necessity for the enjoyment. *Carr v. Foster*, 3 Q. B. 581. It has been ruled, that if there be 10 years' enjoyment of a right of way, and then a cessation under a temporary agreement for another 10 years, yet this may be a sufficient enjoyment of the old right for 20 years to make it indefeasible under the statute, for the agreement to suspend the enjoyment of the right does not extinguish, nor is it inconsistent with the right. Thus, if, instead of a direct path from A. to B., another track over the plaintiff's land from A. to C. and thence to B., had been substituted by oral agreement of the parties for an indefinite time, yet the user of the substituted line may be considered as substantially an exercise of the old right, and evidence of the continued enjoyment of it. *Per Patteson, J., Payne v. Shedden*, 1 M. & Rob. 383; and see *Hale v. Oldroyd*, 14 M. & W. 789; *Hall v. Swift*, 4 N. C. 381. In order to prove 40 years' user, evidence may be given further back, to raise a presumption of user at the beginning of the period of the 40 years. *Lawson v. Langley*, 4 Ad. & E. 890. An interruption under this Act must be by the owner of the *locus in quo* (i.e., of the servient land). *Per Parke, B., Onley v. Gardiner*, 4 M. & W. 497. Where, pending negotiations for a compromise, there has been an interruption of the enjoyment for more than one year before action brought, it is for the jury to say whether the interruption has been acquiesced in or not. *Bennison v. Cartwright*, 5 B. and S. 1; 33 L. J., Q. B. 137. *Accord. Glover v. Coleman*, L. R., 10 C. P. 108, *ante*, p. 819. When non-user of a way for a year is proved by the defendant, he may also prove payment of an acknowledgment for the user just before the non-user, in order to rebut the inference of a mere voluntary forbearance on the part of the claimant. *Tickle v. Brown*, 4 Ad. & E. 369. A claim of way for cattle and carts may be proved by showing constant use for cattle, and a user for less than 20 years for carts, the claimant not having possessed carts for parts of the period. *Dare v. Heathcote*, 25 L. J., Ex. 245.

A consent in writing by a party who could have objected, during any part of the period, will prevent the operation of the statute. *Toyntee v. Brown*, 3 Exch. 117 (decided on the Tithe Prescription Act, 2 & 3 W. 4, c. 100). *Quære*, whether a consent contained in an answer in Chancery would be sufficient. S. C.

By sect. 7 (*ante*, p. 823), where the person who ought to resist the claim of right is under certain disabilities, or is tenant for life, the period of disability or of the life estate is to be excluded from the period of 20 or 30 years, as the case may be. If, therefore, any such disability occur during the 20 or 30 years next before the suit, the claimant must make up the full period by proof of user before it began; and the whole period of 20 or 30 years so made up will be deemed to be "next before the suit" within the meaning of the act. Thus, where defendant pleaded enjoyment of a profit *in alieno solo* for 30 years, to which the plaintiff replied a tenancy for life

for 25 years out of the 30, to which the defendant rejoined that the life estate did not continue during the 30 years, and defendant proved an enjoyment for 24 years next before, and 6 years next after the life estate till action brought, the defendant was held entitled to a verdict. *Clayton v. Corby*, 2 Q. B. 813. But, in the absence of such special reply, 30 consecutive years must be shown. S. C. The life-estate must be specially replied, and cannot be shown on a traverse of the enjoyment; for it is a "matter not inconsistent with the simple fact of enjoyment." *Page v. Mumford*, 11 Q. B. 666; *Kinloch v. Nerile*, 6 M. & W. 795. And it would seem that such disability will not prevent a legal interruption, submitted to while it lasted, from defeating the claim. *Clayton v. Corby*, *supra*.

Under sect. 8 (*ante*, p. 828), a tenancy of term of life, or of years exceeding 3, will be excluded from the computation of 40 years (applicable to ways and watercourses), only on condition that the claim is resisted by the reversioner, within 3 years after the determination of the term. *Wright v. Williams*, 1 M. & W. 77. But such tenancy for more than 3 years is not excluded from the computation where the claim is in respect of 20 years' enjoyment. *Palk v. Shinner*, 18 Q. B. 568; 22 L. J., Q. B. 27. In sect. 8, the word "reversion" does not include a remainder. *Laird v. Briggs*, 19 Ch. D. 22 C. A.

Where a way has been used, adversely for 20 years, over land in possession of a lessee, A., the dominant and servient tenements being both held under leases for lives granted by a bishop B., who held it in right of his see, this user did not affect the see and gives no right as against either B. or A., *Bright v. Walker*, 1 C. M. & R. 211; *accord. Wheaton v. Maple*, (1893) 3 Ch. 48, C. A.; for "the act has not created a class of easements which could not be gained by prescription at common law, or in other words, has not created an easement for a limited time only, or available only against particular owners or occupiers of the servient tenement." S. C. *Id.* 65. So where there has, in a similar case, been adverse user for 40 years. *Kilgour v. Goldes*, (1904) 1 K. B. 457 C. A., overruling *dictum* of Chitty, J., in *Harris v. De Pinna*, 33 Ch. D. 238, 251 *et seq.*

Public right of way.] In an action for the disturbance of a public right of way, the statement of claim usually states the existence of a public highway, the plaintiff's possession of adjoining premises, and his disturbance in the use of the way. For an obstruction of a permanent character it would seem that an action may be brought by a reversioner. *Kilgill v. Moor*, 9 C. B. 364; 19 L. J., C. P. 177; *Simpson v. Savage*, 1 C. B., N. S. 347; 26 L. J., C. P. 50. It must be shown that the plaintiff has sustained an inconvenience beyond that which is common to the public at large. *Vide Action for Nuisance*, *ante*, p. 759.

Proof of public way.] Public ways, when not created and regulated by Acts of Parliament, are usually proved by notorious and uninterrupted user, from which a dedication to the public by the owner of the land over which the way extends may be implied. "If the owner of the soil throws open a passage and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public." *Per* Ld. Ellenborough, *R. v. Lloyd*, 1 Camp. 262; *British Museum, Trustees of v. Finnis*, 5 C. & P. 460. But, proof of a bar having been placed across the street soon after the houses which form the street were finished, will rebut the presumption of dedication, though the bar was soon afterwards knocked down, and the way used as a thoroughfare. *Roberts v. Karr*, 1 Camp. 262, n. See also *Healey v. Batley, Corporation of*,

L. R., 19 Eq. 375. The question of dedication depends upon the time and nature of the enjoyment of the passage over the land; therefore where the plaintiff erected a street leading out of a highway across his own close, and terminating at the edge of the defendant's adjoining close, which was separated by the defendant's fence from the end of the street, after 21 years (during 19 of which the houses were completed, and the street publicly watched, cleansed and lighted, and both footways and half the horseway paved at the expense of the inhabitants), it was held, that this street was not to be presumed to be so dedicated to the public, as that the defendant, pulling down his own wall, might enter it at the end adjoining to his land, and use it as a highway. *Woodyer v. Hadden*, 5 Taunt. 125. See *Poole v. Huskinson*, 11 M. & W. 827. But, a public right of way may exist over a place which is not a thoroughfare; *Bateman v. Bluck*, 18 Q. B. 870; 21 L. J., Q. B. 406; *Vernon v. St. James' Vestry*, 16 Ch. D. 449; provided expenditure has been incurred on it by the local authority. See *Bourke v. Davis*, 44 Ch. D. 110, 123, *per Kay, J.*; *A.-G. v. Antrobus*, (1905) 2 Ch. 188, 206, 207; *Whitehouse v. Hugh*, (1906), 1 Ch. 253; 2 Ch. 283, C. A. So there may be a public right of way along an artificial structure, as a bridge. *Gd. Surrey Canal Co. v. Hall*, 1 M. & Gr. 392. Or a sea wall. *Greenwich Board of Works v. Maudslay*, L. R., 5 Q. B. 397. A public right of way must *prima facie* lead from one public place to another; *A.-G. v. Antrobus*, *supra*; it cannot be acquired by mere user of a way leading to an object of interest, *e.g.*, Stonehenge, on private property. S. C. A way ceases to be public when access at both ends has become impossible by reason of the ways leading to it having been legally blocked up. *Bailey v. Jamieson*, 1 C. P. D. 329. The right of the public to go in boats along a non-tidal river is a right of way. *Orr-Ewing v. Colquhoun*, 2 Ap. Ca. 839, D. P.; *Bourke v. Davis*, *supra*. The user of the way may have been under such circumstances that no right should be inferred therefrom. *Behrens v. Richards*, (1905) 2 Ch. 614, 620, following *Blount v. Layard*, (1891), 2 Ch. 691 n, *per Bowen*, L. J.

It seems that there may be a limited dedication of a highway to the public; as a way excluding carriages, &c. *Stafford, Ms. of v. Coyney*, 7 B. & C. 257. But, not a dedication to a limited portion of the public as to a parish. *Bermondsey, Vestry of v. Brown*, L. R., 1 Eq. 204; 35 Beav. 226; *Poole v. Huskinson*, *supra*. If a way be dedicated, with a reservation which cannot take effect in law, the dedication is void. S. C. It is doubtful whether a private person can, *mero motu*, dedicate a public way, subject to the reservation of toll for the user thereof. *Austerberry v. Oldham, Cor. of*, 29 Ch. D. 750, C. A. Trustees in whom land is vested for public purposes, may lawfully dedicate the surface of it to the public as a highway, if such use be not inconsistent with the purposes of their trust. *R. v. Leake*, 5 B. & Ad. 469; *accord. Gd. Surrey Canal Co. v. Hall*, 1 M. & Gr. 392; *Gd. Junction Canal Co. v. Petty*, 21 Q. B. D. 273, C. A. Though it is otherwise where such use would be inconsistent with those purposes. *Mulliner v. Midland Ry. Co.*, 11 Ch. D. 611. It has been held in one case, that six years may be sufficient to found the presumption of dedication; *Rugby Charity, Trustees of v. Merryweather*, 11 East, 376, n.; and where the *locus in quo* had been in lease for a long term down to the year 1780, and from that year, till the year 1788, the public were permitted to have the free use of it as a way, this was held sufficient time for presuming a dedication. S. C. Whether there be a dedication or not, is always a question of intention, and may be disproved by the acts of the owner, or the circumstances under which the user has been permitted. *Barraclough v. Johnson*, 8 Ad. & E. 99. If the land be in the possession of a tenant, such tenant cannot dedicate it to the public, so as to bind the owner of the fee. *Wood v. Feal*, 5 B. & A. 454; *Bermondsey, Vestry of v. Brown*, *supra*. Nor can the tenant dedicate it for his term.

Corsellis v. L. County Council, (1907) 1 Ch. 704, *cor.* Neville, J. But, after a long lapse of time and a frequent change of tenants, *Ld. Ellenborough* held, that from the notorious and uninterrupted use of a way by the public, it might be presumed that the landlord had notice of the user, and that it was with his concurrence; *R. v. Barr*, 4 Camp. 16; or that the way had been dedicated by the landlord before the date of the lease. *Winterbottom v. Derby, Ltd.*, L. R., 2 Ex. 316. And, where public user alone, for 6 or 7 years, was shown, the presumption was held not to be rebutted by proof that the land had been a short time before in strict settlement, but had been sold in fee under a power before the user began. It lies on those who deny the dedication to show that there was no one *in esse* at the time who was competent to dedicate. *R. v. Petrie*, 4 E. & B. 738; 24 L. J., Q. B. 857. Where a public footway over Crown land was extinguished by an inclosure act, but for 20 years after the inclosure took place, the public had continued to use the way, it was ruled that this user was no evidence of a dedication to the public, as it did not appear to have been with the knowledge of the Crown. *Harper v. Charlesworth*, 4 B. & C. 574. Yet there may be a dedication by the Crown; and where the user has been uninterrupted for 40 or 50 years, and the land not under lease, the dedication *ought* to be presumed, whether the freehold be in the Crown or in an unknown party. *R. v. East Mark*, 11 Q. B. 877; *Turner v. Walsh*, 6 Ap. Ca. 636, J. C. A corporation can dedicate a public way, provided such way be not inconsistent with the objects for which they are incorporated. *Gd. Surrey Canal Co. v. Hall*, *infra*; *Greenwich Board of Works v. Maudslay*, L. R., 5 Q. B. 397. See notes to *Doraston v. Payne*, 2 Smith's L. Cases.

The Highway Acts, 1835 and 1864 (5 & 6 W. 4, c. 50, and 27 & 28 V. c. 101), do not affect the mode by which a highway may be dedicated to the public, except where it is sought to make the parish liable to repairs. *R. v. West Mark*, 2 M. & Rob. 305; *Gd. Surrey Canal Co. v. Hall*, 1 M. & Gr. 392, 401; *Roberts v. Hunt*, 15 Q. B. 17; *Healey v. Cor. of Batley*, L. R., 19 Eq. 375. A road set out by a commissioner under the Inclosure (Consolidation) Act, 1801 (41 G. 3, c. 109), ss. 8, 9, does not become a highway until the requirements of the act have been complied with. *Cubitt v. Maxse*, L. R., 8 C. P. 704.

Where an ordinary highway runs between fences upon both sides those are *prima facie* its boundaries, and the public are entitled to make use of the whole space, and are not confined to that part which is metalled or kept in order for traffic, and any practical obstruction which hinders any one from using the way in this manner will be an indictable nuisance even although the obstruction was sanctioned by the road authority. *R. v. U. K. Telegraph Co.*, 31 L. J., M. C. 166; imperfectly reported, 2 B. & S. 647, n.; *R. v. Train*, 2 B. & S. 647; 31 L. J., M. C. 169; *Turner v. Ringwood Highway Board*, L. R., 9 Eq. 418; *Harvey v. Truro, &c. Council*, (1903) 2 Ch. 638; *Offin v. Rochford Rural, &c. Council*, (1906) 1 Ch. 342. The presumption may, however, be rebutted where the facts raise a counter-presumption that the fences were placed for a different purpose; *S. C. per Warrington, J.*, following *Neeld v. Hendon Urban Council*, 81 L. T. 405, M. Sit., 1899, *per C. A.*; or that there had been user of the unmetalled part, inconsistent with its being a highway; *S. C.*; *Belmore, Coss. of v. Kent County Council*, (1901) 1 Ch. 873. See further as to dedication, *A.-G. v. Esher Linoleum Co.*, (1901) 2 Ch. 647, and *Chorley Cor. v. Nightingale*, (1906) 2 K. B. 612. Unless the obstruction of the highway is appreciable the defendant will be entitled to a verdict. *R. v. Lepille*, 15 L. T. 158, M. T. 1866, Q. B. And a highway may be dedicated with an obstruction upon it, such as a flap-door opening into a vault, a stile, &c. *Fisher v. Prowe*, *Cooper v. Walker*, 2 B. & S. 770; 31 L. J., Q. B. 212; *Robbins v. Jones*, 15 C. B., N. S. 221; 33 L. J., C. P. 1; see *Action for nuisance*, *ante*, p. 764. So, a public footpath

may be dedicated across a field, subject to the right of the owner of the field to plough it up at seasonable times; and the proper inference to be drawn from the owner having always so ploughed up the field is, that it was only such qualified enjoyment that was dedicated to the public. *Mercer v. Woodgate*, L. R., 5 Q. B. 26; *Arnold v. Blaker*, L. R., 6 Q. B. 433, Ex. Ch. So, a highway may be dedicated subject to the right to hold a market thereon. *A.-G. v. Horner*, 11 Ap. Ca. 66, C. A.; *Gingell, &c., v. Stepney Borough Council*, (1906) 2 Ch. 468.

Disturbance by the defendant—Special damage.] The plaintiff must prove some disturbance by the defendant when denied by him in his defence. The disturbance may be by ploughing up the way, &c. Com. Dig. Case for Disturbance (A. 2). For though the grantor is not generally bound to repair it, he cannot lawfully impair it by his own act. The obstruction may be caused by the successive acts of different persons, one of which alone would not create appreciable damage. *Thorpe v. Brumfitt*, L. R., 8 Ch. 650; followed in *Lambton v. Mellish*, (1894) 3 Ch. 163.

Where the action is for a nuisance in a public highway, the plaintiff must prove special damage when denied. Mere delay caused to the plaintiff as well as to other persons having occasion to use a road on which is an obstruction complained of, is not such special damage. *Winterbottom v. Derby, Ltd.*, L. R., 2 Ex. 316. But, the expense of conveying goods, &c., by a longer and less convenient way to the plaintiff's land, is sufficient damage to support an action for obstructing a public highway. *Dobson v. Blackmore*, 9 Q. B. 991; *Blagrove v. Bristol Waterworks Co.*, 1 H. & N. 369; 26 L. J., Ex. 57. So, the injury done to a public-house or shop, by the obstruction of customers, who would otherwise have come to him. *Rose v. Groves*, 5 M. & Gr. 613; *Benjamin v. Storr*, L. R., 9 C. P. 400; *Wilkes v. Hungerford Market Co.*, 2 N. C. 281; *Fritz v. Hobson*, 14 Ch. D. 542. It was indeed held that a temporary obstruction erected by the defendants on a highway, rendering access to a footway, whereon the plaintiff's public-house was situated, more difficult, and thereby causing a loss of trade to the plaintiff, gave him no right to compensation under the Lands or Railways Clauses Consolidation Acts, 1845, because he could not have maintained an action to recover damages for such loss. *Ricket v. Metropolitan Ry. Co.*, L. R., 2 H. L. 175. It is otherwise, however, where a similar claim has been substantiated in respect of injury to the selling or letting value of the public-house, treated as unlicensed; *Wadham v. N. E. Ry. Co.* 14 Q. B. D. 747; 16 *Id.*, 227, C. A.; for where the obstruction directly diminishes the value of the plaintiff's house or land, it will give a right to compensation. *Beckett v. Midland Ry. Co.*, L. R., 3 C. P. 82; *McCarthy v. Metropolitan B. of Works*, L. R., 7 H. L. 443; *Caledonian Ry. Co. v. Walker's Trustees*, 7 Ap. Ca. 259, D. P.; *Ford v. Metropolitan, &c. Ry. Co.*, 17 Q. B. D. 12, C. A. See also *Buccleuch, Dk. of v. Metrop. B. of Works*, L. R., 5 H. L. 418; *Couper Essex v. Acton Local Board*, 14 Ap. Ca. 153, C. A.; *In re L., Tilbury & Southend Ry. Co. and Gower's Walk Schools*, 24 Q. B. D. 40, 326, C. A. Where the obstruction is caused by the discharge of the defendant's waggons, &c., to his premises, the question of his liability depends on whether it is greater than is reasonable, in point of time and manner, having regard to the interest of all parties, and without unnecessary inconvenience. *Benjamin v. Storr*, L. R., 9 C. P. 402, *per* Honyman, J.; *Fritz v. Hobson*, *supra*. See also cases cited *ante*, p. 762.

The owner of land adjoining a public highway has a right to go on the highway from any point on his own land. *Marshall v. Ulleswater Navigation Co.*, L. R., 7 Q. B. 166, 178, *per* Blackburn, J. This right of access to his premises is a private right, but his right to transfer goods to them from the highway across the public footway, is only an individual interest in a public

right, which he enjoys as one of the public. *W. H. Chaplin v. Westminster Cor.*, (1901) 2 Ch. 329, following *A.-G. v. Thames Conservators*, 1 H. & M. 1.

As to disturbance of water-way in a navigable river, see *Orr-Ewing v. Colquhoun*, 2 Ap. Ca. 839, D. P.

Proof of way—by order of Inclosure Commissioners.] Under the 41 G. 3, c. 109, s. 8, the Inclosure Commissioners have power to “set out and appoint the public carriage roads and highways” over the lands to be inclosed. And by sect. 10, the same power is given to set out private roads; and by sect. 11, all roads, other than turnpike roads, not set out by the commissioners, are extinguished.

Damages.] *Vide ante*, p. 815, and *Nuisance—Damages, ante*, p. 815.

Injunction.] As to right of injunction in lieu of damages, see *Krehl v. Burrell*, 7 Ch. D. 551; 10 Ch. D. 420, C. A., and other cases cited *ante*, p. 821.

Defence.

By Rules, 1883, O. xix., r. 17, a defendant may not now plead a general denial of the allegations in the statement of claim; and r. 15 requires him to state all such facts on which he relies as do not appear therein, and if not stated would be likely to take the plaintiff by surprise. See the rules, *ante*, p. 309.

Denial of the right.] The defendant may, under this defence, prove that the way was only a way by sufferance during the pleasure of himself and the plaintiff; *Reignolds v. Edwards*, Willes, 282; as evidence of which he may show that he has kept a gate across the road, or that the plaintiff has paid him a compensation for the use of the way. And though these cases were before the Prescription Act, they seem to be still law, for they show a precarious enjoyment. So proof of leave and licence is evidence under a traverse of the right. *Beasley v. Clarke*, 2 N. C. 705. And see further *ante*, pp. 828 *et seq.* As to the effect of admissions by previous occupiers or tenants of the dominant tenement, see *Admissions, ante*, p. 67.

No right of way is acquired by user, enjoyed over every part of a close, and not in any defined or visible path. *Schwinge v. Dowell*, 2 F. & F. 845; *Robinson v. Cowpen Local Board*, 63 L. J., Q. B. 235. But it seems that a right of way between two definite termini may be acquired, although the user has been in respect of various tracks between those termini. *Wimbledon, &c. Conservators v. Dixon*, 1 Ch. D. 362, C. A.

Extinguishment or cesser of right of way.] If the way is claimed as a way of necessity, it has been held that the defendant may show that the plaintiff can approach the place to which it leads, over his own land, and that consequently the way of necessity has ceased. *Holmes v. Goring*, 2 Bing. 76; *Acc. Pearson v. Spencer*, 3 B. & S. 761, 767, *per Ex. Ch.* But see *Proctor v. Hodgson*, 10 Exch. 874; 24 L. J., Ex. 195.

The defendant may also show that the right of way has been renounced and abandoned, by acquiescing in an obstruction for more than 20 years. *Bower v. Hill*, 1 N. C. 555. Or, where it is claimed under the act, the defendant may show acquiescence in an interruption, for one year of the 20 or 40 years, relied on by the plaintiff. See *Glover v. Coleman*, L. R., 10 C. P. 108, *ante*, p. 819. But, where a party was entitled to pass along a navigable drain from his land to the river, and the owner of the land lower down erected

a permanent obstruction across the drain, it was held that the circumstance of part of the drain having been impassable for 16 years from an accumulation of mud, did not deprive the party of his right to sue for such obstruction. *Bower v. Hill*, *ante*, p. 835. The mere non-user of a way does not, in the absence of the acquisition of rights by other parties in consequence of it, amount to an abandonment; it only raises the inference that there has been no occasion to use it. *Ward v. Ward*, 7 Exch. 839; 21 L. J., Ex. 334. In this case there had been a temporary user of another way by reason of its greater convenience. In *Cook v. Bath, Mayor, &c. of*, L. R., 6 Eq. 177, the right of way through the back-door of a dwelling-house was held not to have been abandoned, although the occupier had built up the doorway, and kept it so blocked up for 40 years. See further, *ante*, p. 820.

The defendant may prove an extinguishment of the right, by a substantial alteration in the original object of the grant of the way; thus where a way is granted to an open piece of ground "now used as a wood-house," the grantee, though not bound to continue to use it as a wood-house, cannot use the way for a dwelling-house built thereupon. *Allan v. Gomme*, 11 Ad. & E. 759. Or, he may show a use of the way for purposes not contemplated by the grant, as the misuse for merely agricultural purposes, of a way to a coach-house and stable. *Henning v. Burnet*, 8 Exch. 187; 22 L. J., Ex. 79. So, a right of way to a farm, for agricultural purposes merely, cannot be enlarged by building houses on the farm. *Wimbledon, &c. Conservators v. Dixon*, *ante*, p. 835. See also *Collins v. Slade*, 9 W. N. 1874, p. 205, M. T., V.-C. B.; *Wood v. Saunders*, L. R., 10 Ch. 582; and *Milner's Safe Co. v. Gt. N. & City Ry. Co.*, (1907) 1 Ch. 208. And this principle applies to the re-grant of a way of necessity. *London, Cor. of v. Riggs*, *vide ante*, p. 827. So, where there is a right of way to a close A., this will not justify a user of the way for conveying goods to A. for the express purpose of afterwards removing them to an adjoining close. *Skull v. Glenister*, 16 C. B., N. S. 87; 33 L. J., C. P. 185; *Williams v. James*, L. R., 2 C. P. 577. See also *Harris v. Flower*, 21 T. L. R. 13, M. Sit., 1904, C. A. But, a way is not necessarily lost by an alteration, improvement, or enlargement of the premises to which it is annexed, nor, by every change in the use or destination of them. The nature of the way depends upon the terms of the grant and expressed object of it, or on the prejudice arising to the grantor by the altered user, and the question for the jury will be whether it was a reasonable or merely colourable use of the way. See the cases last cited; *Watts v. Kelson*, L. R., 6 Ch. 166, 169, n.; *Serff v. Acton Local Board*, 31 Ch. D. 679, and *Gt. W. Ry. Co. v. Talbot*, (1902) 2 Ch. 759, C. A., distinguishing *United Land Co. v. Gt. E. Ry. Co.*, L. R., 10 Ch. 586. Where there is no substantial variance in the enjoyment, the right to an easement is not affected; *Luttrell's case*, 4 Rep. 86; *Thomas v. Thomas*, 2 C. M. & R. 34; *Harvey v. Walters*, L. R., 8 C. P. 162. As to grants of ways under enclosure awards, see *Newcomen v. Coulson*, 5 Ch. D. 133, C. A., and *Finch v. Gt. W. Ry. Co.*, 5 Ex. D. 254.

Unity of possession extinguishes an easement. *Clayton v. Corby*, 2 Q. B. 813. But where the party has different estates in the two pieces of land, as an estate in fee in the land over which, and a term of years in the land in respect of which, the easement exists, the easement is suspended only, and not extinguished. *Thomas v. Thomas*, *supra*; and see *ante*, p. 820. So, where a way has been extinguished by unity of possession, a grant of the former dominant tenement, together with all ways, &c., used or enjoyed therewith, will revive the right of way. *James v. Plant*, 4 Ad. & E. 749, Ex. Ch.; *Thomson v. Waterloo*, L. R., 6 Eq. 36, 41; *Langley v. Hammond*, L. R., 3 Ex. 161, 168. And even where a right of way had never previously existed as such, but was merely a user of one part of his property A., by the land-owner for the more convenient enjoyment of the remaining part B., the general

words in the grant of A., may pass a right of way over B. *Kay v. Orley*, L. R., 10 Q. B. 360; explaining *Thomson v. Waterlow*, *Jangle v. Hammond*, and *Watts v. Kelson*, *ante*, p. 836; accord. *Barkshire v. Grubb*, 18 Ch. D. 616; *Bayley v. Gt. W. Ry. Co.*, 26 Ch. D. 434, C. A., and *Brown v. Alabaster*, 37 Ch. D. 490. See also *Thomas v. Owen*, 20 Q. B. D. 225, C. A., and *May v. Bellville*, cited *ante*, p. 826.

A prescriptive right, once acquired, is not lost by any subsequent act, not amounting to a surrender, although such act would, previous to the acquisition of such right, have rendered the user precarious. *French Hoek, Commissioners v. Hugo*, 10 Ap. Ca. 336, J. C. (watercourse).

ACTION FOR DISTURBANCE OF WATERCOURSE.

The principal allegations in the statement of claim are usually, 1. The possession of a mill, water-meadow, or other tenement in respect of which the right of water is enjoyed; 2. The right to the water; 3. The disturbance; 4. The damage.

Proof of the right to the water.] The right to the use of water flowing in a natural stream upon the surface of the earth belongs of right to the proprietors of the adjoining land, and is not enjoyed by virtue of acquiescence, or a presumed grant. *Chasemore v. Richards*, 7 H. L. C. 349; 29 L. J., Ex. 81; *Wood v. Waud*, 3 Exch. 748, 775. A riparian proprietor has a right to a reasonable use of the water for his domestic purposes, and for his cattle, without regard, in case of a deficiency, to the interests of proprietors lower down the stream. He further has a right to the use of it for any purpose provided he does not thereby interfere with the rights of other proprietors above or below him. Subject to this condition he may dam up the stream for a mill, or divert the water for irrigation. *Miner v. Gilmour*, 12 Moo. P. C. 131, 156; *Orr Ewing v. Colquhoun*, 2 Ap. Ca. 839, D. P.; *John White & Sons v. J. and M. White*, (1906) A. C. 72, D. P. See *Swindon Waterworks Co. v. Wilts & Berks Canal, &c. Co.*, *post*, p. 838. But, the right to use it to the prejudice of any proprietor of land above or below, by throwing back, diverting, or polluting it, is a right for which the claimant must show a title by contract, prescription, or other adequate authority. *Mason v. Hill*, 5 B. & Ad. 1; *Embrey v. Owen*, 6 Exch. 353; 20 L. J., Ex. 212. See *McIntyre v. McGavin*, (1893) A. C. 268, D. P. A riparian owner on a navigable tidal river has, subject to the public right of navigation, the same rights as an ordinary riparian owner. *Lyon v. Fishmongers' Co.*, 1 Ap. Ca. 662, D. P. So has an owner on the sea-shore. *A.-G. of Straits Settlements v. Wemyss*, 13 Ap. Ca. 192, J. C. The provisions of the Prescription Act, 1832 (2 & 3 W. 4), c. 71, which apply to ways or watercourses, have been already referred to (*ante*, pp. 827, 828), and the decisions on the statute, upon rights of way, are generally also applicable to rights of water. The right to take water from a well, for domestic purposes, is an easement, and not a *profit à prendre*. *Race v. Ward*, 4 E. & B. 702; 24 L. J., Q. B. 153. A precarious licensee of the use of the water of a stream, can perhaps sue a stranger for fouling it, if he have notice of the licence, and of the injurious effect the fouling will have to the plaintiff. *Laing v. Whaley*, 3 H. & N. 675, 681; 27 L. J., Ex. 422, 423, Ex. Ch., *per* Crompton, J. The grantee of an exclusive right of fishing can sue any one who wrongfully does any act prejudicial to his right. *Fitzgerald v. Firbank*, (1897) 2 Ch. 96, C. A.

The owner of a riparian tenement has no right to divert the water to a place outside the tenement and there consume it for purposes foreign to the

tenement. *Swindon Waterworks Co. v. Wilts & Berks Canal, &c. Co.*, L. R., 7 H. L. 697; *McCartney v. Londonderry, &c. Ry. Co.*, (1904) A. C. 301, D. P. Where a riparian owner, A., grants to B., land not abutting on the river, together with the right to take water from the river, B. acquires no water rights except as against A.; for the rights of the occupier of the river bank cannot be severed and conveyed in gross. *Stockport W. Works Co. v. Potter*, 3 H. & C. 300; *Ormerod v. Todmorden Joint Stock Mill Co.*, 11 Q. B. D. 155, C. A. But, if the stream be divided so that one section of it flows by an artificial goitre through land A., then the grantee of A. becomes a riparian owner, and has all the rights of such owner in respect to that section of the stream. *Nuttall v. Bracewell*, L. R., 2 Ex. 1; *Holker v. Poritt*, L. R., 8 Ex. 107; Ex. Ch., L. R. 10 Ex. 59; *Baily v. Clark*, (1902) 1 Ch. 649. A grant by the higher landowner to the lower landowner "and his assigns" will justify an assignee in suing for disturbance of his use of the water, claiming it "by reason" of his possession of the land. *Northam v. Hurley*, 1 E. & B. 665; 22 L. J., Q. B. 183. See *Hamelin v. Bannerman*, (1895) A. C. 237, J. C.

As to the construction of a grant of a "watercourse," see *Taylor v. Cor. of S. Helens*, 6 Ch. D. 264, C. A. Where the grant is of the duct through which the water passes, the grantee cannot enlarge the duct. S. C.

As to implied grants and reservations of easements, see *Nicholas v. Chamberlain*, Cro. Jac. 121; *Wardle v. Brocklehurst*, 1 E. & E. 1058; 29 L. J., Q. B. 145, Ex. Ch.; *Worthington v. Grinson*, 2 E. & E. 618; 29 L. J., Q. B. 116; *Polden v. Bastard*, L. R., 1 Q. B. 156, 159; *Watts v. Kelson*, L. R., 6 Ch. 166; *Suffield v. Brown*, 4 D. J. & S. 185; 33 L. J., Ch. 249; *Kay v. Oxley*, L. R., 10 Q. B. 360; *Barnes v. Loach*, 4 Q. B. D. 494; *Bayley v. Gt. W. Ry. Co.*, 26 Ch. D. 434, C. A.; and *Union Lighterage Co. v. L. Graving Dock Co.*, (1902) 2 Ch. 557, C. A. See also cases collected, *ante*, pp. 817, 826. The case of *Pyer v. Carter*, 1 H. & N. 916; 26 L. J., Ex. 258, was expressly overruled by *Wheeldon v. Burrows*, 12 Ch. D. 31, C. A.

Such rights as those previously mentioned may be acquired, though the channel for the water be wholly artificial, and made for a different purpose; as where the owners of a brewery had enjoyed the use of water issuing for 20 years, out of the mouth of a disused adit, made to drain mines, it was held that the mine owners could not afterwards resume the working of the mine, so as to affect the water. *Magor v. Chadwick*, 11 Ad. & E. 571. If, however, the adit water had been used with notice of the intention to resume the workings, or under circumstances from which such notice must necessarily be inferred, or if there had been a local custom to resume them at any time, it seems that no right would have been thereby gained. In the above case natural and artificial streams are treated as undistinguishable in point of law, so far as respects the acquisition of rights over them. But, in *Arkwright v. Gell*, 5 M. & W. 203, and *Wood v. Waud*, 3 Exch. 748, it was held that artificial streams came under a different rule, and that long enjoyment would not give a right to the unobstructed use of a sough or stream, obviously made for temporary purposes, as to drain a mine, at least as against any one claiming under the makers; and the court further distinguished *pollution* from *diversion*, holding that the latter might be lawful in cases where the former was not. See also *Hodgkinson v. Ennor*, 4 B. & S. 229; 32 L. J., Q. B. 231, *post*, p. 839; *Mason v. Shrewsbury & Hereford Ry. Co.*, L. R. 6 Q. B. 578. So where the artificial stream was made to work a mill. *Burrows v. Lang*, (1901) 2 Ch. 502. So, where neighbouring land is benefited by the water flowing through artificial drains, made by a farmer for draining his own land, it was held that the farmer, for the purposes of cultivation, might deepen the drain, and thereby draw off the water, though the plaintiff

had enjoyed it for 50 years. *Greatrac v. Hayward*, 8 Exch. 291; 22 L. J., Ex. 137. *Accord. Gaved v. Martyn, infra*. But rights can be gained to water flowing through an artificial cut, though such cuts are not to be treated as being necessarily on the same footing as natural streams, so far as regards ordinary riparian rights. Thus, a right may exist by user to divert water from a stream from time to time by an old artificial cut, to supply cattle with water when required. *Beeston v. Weate*, 5 E. & B. 986; 25 L. J., Q. B. 115. And an artificial watercourse may "have been originally made under such circumstances, and have been so used as to give all the rights that the riparian proprietors would have had, had it been a natural stream." *Sutcliffe v. Booth*, 32 L. J., Q. B. 136, 139. See also *Nuttall v. Bracewell*, *Holker v. Poritt*, and *Baily v. Clark*, cited *ante*, p. 838, and *Rameshur Singh v. Pattuk*, 4 Ap. Ca. 121, J. C. And there is a distinction between an artificial watercourse supplied by natural springs and another supplied by water brought to the surface by mining operations, for the former can, while the latter cannot, be the subject of an easement. *Gaved v. Martyn*, 19 C. B., N. S. 732; 34 L. J., C. P. 353. See also *Ivimey v. Stocker*, L. R., 1 Ch. 396.

Where a natural stream is partly fed by surface drainage, as by an overflow of ponds formed by land springs, and of wells and watering-places for cattle in wet seasons (such overflow not running in a fixed and defined watercourse), the owner of a mill on the stream cannot sue the landowner, for a diversion or stoppage of such sources of supply. *Broadbent v. Ramsbotham*, 11 Exch. 602; 25 L. J., Ex. 115; *Rawstron v. Taylor*, 11 Exch. 369; 25 L. J., Ex. 33. But, where a stream flows in a defined channel from a spring head, a diversion and detention of the water, by pipes and tanks, at the head is actionable. *Dudden v. Clutton Union*, 1 H. & N. 627; 26 L. J., Ex. 146; *Mostyn v. Atherton*, (1899) 2 Ch. 360. So, interference with a stream flowing underground in a definite known channel or tunnel affords a right of action. *Holker v. Poritt*, *ante*, p. 838. *Secus*, where the existence and course of the channel are not known, and cannot be ascertained without excavation. *Bradford Cor. v. Ferrand*, (1902) 2 Ch. 655. Unseen underground waters arising from percolation through the ground are distinguishable from open streams, and the doctrine of presumed grants is inapplicable to them. Hence, a millowner cannot complain if a neighbouring landowner digs a deep well in his land, and thereby sensibly diminishes the waters of the mill-stream, and the latter may apply or distribute the waters of the well as he pleases. *Chasemore v. Richards*, 2 H. & N. 168; 26 L. J., Ex. 393; 7 H. L. C. 349; 29 L. J., Ex. 81; *English v. Metrop. Water Board*, (1907) 1 K. B. 588; see *McNab v. Robertson*, (1897) A. C. 129, D. P. It is immaterial that the well has been dug merely *animo vicino nocendi*, and not for *bonâ fide* use: *Bradford, Mayor of v. Pickles*, (1895) A. C. 587, D. P. See also *Acton v. Blundell*, 12 M. & W. 324; *Hammond v. Hall*, 10 Sim. 551; *S. Shields Waterworks Co. v. Cookson*, 15 L. J., Ex. 315; *R. v. Metropolitan B. of Works*, 3 B. & S. 710; 32 L. J., Q. B. 105; *Ballacorkish Silver, &c. Co. v. Harrison*, L. R., 5 P. C. 49; and *Popplewell v. Hodgkinson*, cited *ante*, p. 812. It is not actionable to pump up brine which is in part produced in the plaintiff's adjacent salt mine. *Salt Union v. Brunner & Co.*, (1906) 2 K. B. 883. But to discharge muddy water created by works newly erected on the defendant's land, through underground passages, into the plaintiff's pond, is a good cause of action. *Hodgkinson v. Ennor*, 4 B. & S. 229; 32 L. J., Q. B. 231. So does the pollution of unseen percolating waters, injuriously affecting the plaintiff's well. *Ballard v. Tomlinson*, 29 Ch. D. 115, C. A.

A right to cast, into a river or stream, the rubble and refuse of mine works may be claimed by prescription, and therefore by stat. 2 & 3 W. 4, c. 71; or it may exist by local custom; and it seems that this is a claim of a "watercourse" under sect. 2 of the Act. *Curlyon v. Lovering*, 1

H. & N. 784; 26 L. J., Ex. 251; *Wright v. Williams*, 1 M. & W. 77. See the arguments in *Murgatroyd v. Robinson*, 7 E. & B. 391; 26 L. J., Q. B. 233; *Bastard v. Smith*, 2 M. & Rob. 129. So, a right to discharge the refuse of dyeworks or of paper mills. *Crossley, &c. v. Lightowler*, L. R., 2 Ch. 478; *Baxendale v. McMurray*, *Id.* 790. As to the abandonment*of such a right, see *Crossley, &c. v. Lightowler*, *supra*. So, the right to have water intercepted is within sect. 2. *Mason v. Shrewsbury & Hereford Ry. Co.*, L. R., 6 Q. B. 578.

Water passing from the opening of the lock of a canal, is not a watercourse within the section. *Staffordshire Canal Co. v. Birmingham Canal Co.*, L. R., 1 H. L. 254.

Proof of disturbance by defendant.] If the defendant take water out of a stream running through his land to the pond of B., whereby B.'s pond is not so full, this is not actionable, unless there be a permanent diversion of the stream. *Smart v. Stisted*, Com. Dig. Action for Nuisance (C); *Embrey v. Owen*, 6 Ex. Ch. 353; 20 L. J., Ex. 212. But any abstraction or detention of water, so as to produce sensible inconvenience, is actionable. *Wood v. Waud*, 3 Exch. 748. And diversion without actual damage is actionable, where a right, injurious to the plaintiff's right, might be acquired against him by such diversion. *Swindon Waterworks Co. v. Wilts & Berks Canal, &c. Co.*, L. R., 7 H. L. 697; *McCartney v. Londonderry, &c. Ry. Co.*, (1904) A. C. 301, D. P. See further cases cited *infra*. It is actionable by artificial means to discharge into a stream foreign matter which sensibly changes the character of the natural water of the stream. *Young v. Bankier Distillery Co.*, (1893) A. C. 691, D. P. If the defendant have caused the water to be foul, there is a damage in law, although the existence of other causes of foulness, occasioned by other riparian landowners, may make the particular damage done by the defendant undistinguishable. *Wood v. Waud*, *ante*, p. 838. Any user by a stranger is actionable if it sensibly affect the flow of the water; *Ormerod v. Todmorden Joint Stock Mill Co.*, 11 Q. B. D. 155, C. A.; but not otherwise, where no right of the plaintiff has been infringed. *Kensit v. Gt. E. Ry. Co.*, 27 Ch. D. 122, C. A.; see *McCartney v. Londonderry &c. Ry. Co.* (1904) A. C. 313, *per* Lord Macnaghten. As to the mode in which water may be diverted and removed by the owners of adjoining mines, see *Smith v. Kenrick*, 7 C. B. 515; *Baird v. Williamson*, 15 C. B., N. S. 376; 33 L. J., C. P. 101; cited *ante*, p. 791. As to the liability of a sanitary authority for allowing foul matter to pass through their sewers, into the plaintiff's stream, see *A.-G. v. Dorking Guardians*, 20 Ch. D. 595, C. A.; *Brown v. Dunstable Cor.*, (1899) 2 Ch. 378; *Harrington, El. of v. Derby Cor.*, (1905) 1 Ch. 205. Where A., by pumping, brings unseen underground percolating water, polluted by B. into A.'s well, B. is liable for the pollution of the well. *Ballard v. Tomlinson*, 29 Ch. D. 115, C. A.

A riparian owner may moor a floating wharf to his bank, if he do not obstruct the navigation of the river, and may sue for damages occasioned by interference with the flow or purity of the river. *Booth v. Rutte*, 15 Ap. Ca. 188, J. C.

Damages—Injunction.] Actual damage or loss, occasioned by the disturbance or pollution, need not be shown, if it be against the right. 1 Wms. Saund. 346 b, (2); *Embrey v. Owen*, 6 Exch. 353; 20 L. J., Ex. 212; *Dickinson v. Gd. Junction Canal Co.*, 7 Exch. 282; 21 L. J., Ex. 241; *Northam v. Hurley*, 1 E. & B. 665; 22 L. J., Q. B. 183; *Sampson v. Hoddinott*, 1 C. B., N. S. 590; 26 L. J., C. P. 148; *Harrop v. Hurst*, L. R., 4 Ex. 43; *Crossley, &c. v. Lightowler*, *supra*; *McCartney v. Londonderry*,

Ac. Ry. Co., ante, p. 840. So, if a riparian owner encroach on the *alveus* of the stream the owner on the opposite side of the stream may maintain an action without showing special damage; *Bickett v. Morris*, L. R., 1 H. L. Sc. 47; and in like manner an encroachment made on a tidal river, may be restrained at the suit of the Crown, without showing damage. *At-G. v. Lonsdale*, El. of, L. R., 7 Eq. 377; *Id. v. Terry*, L. R., 9 Ch. 423. See, on these cases, *Orr Ewing v. Colquhoun*, 2 Ap. Ca. 839, D. P. As the injury, that may be caused by pollution of the stream, cannot be measured by damages, an injunction is usually the proper remedy. *Pennington v. Brinsop Hall Coal Co.*, 5 Ch. D. 769. But an injunction will only be granted, where the plaintiff has thereby sustained substantial injury entitling him to damages. *Elmhirst v. Spencer*, 2 Mac. & G. 45. As to the damages where the pollution or disturbance is continuing in its nature, see *Hole v. Chard Union*, (1894) 1 Ch. 293, C. A., ante, pp. 295, 771.

Where A. is entitled to the flow of water through his pipes, laid in B.'s land, B. will be restrained from so building thereon, as materially to interfere with A.'s access to the pipes, to cleanse and repair them. *Goodhart v. Hyett*, 25 Ch. D. 182.

Defence.

It is no defence that the stream is fouled by others besides the defendant. *Crossley, &c. v. Lightowler*, ante, p. 840.

If a stranger enter the defendant's land, and wrongfully obstruct or divert a watercourse flowing through it, the defendant is not liable to be sued for this diversion, if it be made against his will, and he has not subsequently recognized it; nor is the defendant bound to remove the obstruction. *Saxby v. Manchester & Sheffield Ry. Co.*, L. R., 4 C. P. 198.

Denial of the right.] This traverse does not put in issue the possession of the dominant tenement by reason whereof the right is claimed. *Dukes v. Gostling*, 1 N. C. 588. Interruptions not acquiesced in for a year are evidence, as where the claimant of the use of water for irrigation, had drawn it off from the defendant's watercourse for 20 years, but had always been resisted, and had once been fined and paid the fine on a conviction for wilfully taking it, the conviction was held admissible to prove a contentious enjoyment throughout, insufficient to gain a right under the statute. *Eaton v. Swansea Waterworks Co.*, 17 Q. B. 267; 20 L. J., Q. B. 482. Where the plaintiff states a right to keep water flowing to a mill, by a weir of a certain height, the defendant may under a special defence show a grant or prescription enabling him to reduce its height. *Ward v. Robins*, 15 M. & W. 237.

Extinguishment or cesser of the right.] A right to water is not destroyed by a partial alteration in the direction of the stream by the claimant; *Hall v. Swift*, 4 N. C. 381; nor by an interruption occasioned by a dry season; *Id.* 384; nor by an alteration in the machinery of the mill turned by it, if not prejudicial to others entitled to the same water. *Saunders v. Newman*, 1 B. & A. 258. Where the plaintiff has, by oral licence, permitted the defendant to erect a permanent work which has necessarily lessened the supply of water, he cannot afterwards revoke the licence or sue for the injury. *Liggins v. Inge*, 7 Bing. 682. The declaration stated an immemorial right to a flow of water, out of the defendant's well, for supplying three ponds in three closes of the plaintiff: the plea traversed the right; it appeared that 30 years ago the plaintiff had diverted the flow of water from an ancient pond in one of the closes, and had carried it into three other ponds, and discontinued the use of the old

pond, which has since become filled with rubbish: held, that he had not thereby lost his old right, but might recover for such a diversion of the water, as prevented it from flowing out of the well into the old pond; and this, although the case opened and attempted to be proved at the trial was that of a right to the supply of the *three* new ponds. And *per Cur. S. C.*, if the claim had been under the Prescription Act, the right would have been equally unaffected by the substitution of the new mode of distributing the overflow from the well. *Hale v. Oldroyd*, 14 M. & W. 789. See further, *ante*, pp. 835 *et seq.*

ACTION FOR DISTURBANCE OF PEW.

This action is now rarely brought.

The statement of claim states the possession of a messuage; the right by reason thereof to use a pew in the parish church during service; and the disturbance of the right by the defendant.

Proof of the right to a pew.] The freehold of the church is in the *persona ecclesie*, whether rector or vicar. Com. Dig. Eccles. Persons (C. 9), (C. 14). Hence the right of others to occupy seats in it is in the nature of an easement, and is usually claimed by prescription or faculty. A pew in the chancel may legally belong to a person in respect of the ownership of a house, or may belong to a lay rector, but a pew in the body of the church can only be acquired by virtue of a faculty, or by virtue of immemorial possession, *i.e.*, by prescription, which is founded on the notion of there having originally been a faculty. *Parker v. Leach*, L. R., 1 P. C. 312, 327. The right to a pew must, except in the case of the rector or vicar, be annexed to a particular messuage or dwelling-house, and not to land. Co. Litt. 121 b, 122 a. Mere use of a pew, however long, if unconnected with a particular house, is not sufficient evidence of a right. *Stocks v. Booth*, 1 T. R. 428; *Mainwaring v. Giles*, 5 B. & A. 356. Nor can the right be severed from the house and claimed in gross. *Pettman v. Bridges*, 1 Phill. 235; and see *Clifford v. Wicks*, 1 B. & A. 498. And even where the occupiers of a certain house have used a pew for many years, the jury are not *bound* to presume a faculty; *Morgan v. Curtis*, 3 M. & Ry. 389; but they will be justified in presuming one; and long possession, without proof of the actual origin of it, will be evidence of a prescriptive right as against a wrongdoer. *Griffith v. Matthews*, 5 T. R. 296; *Rogers v. Brooks*, 1 T. R. 431, n. Repairs done to the pew by the owner of the house are evidence of a prescriptive annexation to the house; but as against strangers, such proof is not indispensable; for it may have required none within living memory. *Kenrick v. Taylor*, 1 Wils. 326; *Churton v. Frewen*, L. R., 2 Eq. 634. See *Crisp v. Martin*, 2 P. D. 15. And long exclusive possession, and repairs done by the occupier, are evidence, even against the parson and churchwardens, of a faculty, although the origin of the possession gave no right. *Halliday v. Phillips*, (1891) A. C. 228, D. P. But the right may be proved by other acts of user, besides repair. *Stileman-Gibbard v. Wilkinson*, (1897) 1 Q. B. 749. The right may be apportioned by the subdivision of the house, and the occupier of the apportioned part of the pew may then sue for disturbance. *Harris v. Drewe*, 2 B. & Ad. 164.

There may be a legal prescriptive right to a pew in the body of a church enjoyed in respect of a house out of the parish; for the parochial

limits may have been contracted or varied within time of memory. *Lousley v. Hayward*, 1 Y. & J. 583; but see *Byerley v. Windus*, 5 B. & C. 1, and the law, generally, as to seats in churches, in *Walter v. Gunner*, 1 Haggr. Consist. Rep. 317.

Where the right is enjoyed only under the usual allotment of seats by the churchwardens, no action lies at common law for mere disturbance of the seat. *Mainwaring v. Giles*, *ante*, p. 842.

Where some attached chapel or aisle belongs to a parishioner or stranger as his private freehold (as may happen, *Fuller v. Lane*, 2 Add. 433; *Hall's case*, cited 2 Bulst. 240; *Gibs. Cod.* 221; *Chapman v. Jones*, L. R., 4 Ex. 273; *Norfolk, Duke of v. Arbuthnot*, 4 C. P. D. 290; 5 C. P. D. 390, C. A.), the remedy is by action of trespass. See S. C. and *Action for trespass to land—Evidence of possession*, *post*, p. 929. In such a case the chapel cannot be held as appendant or appurtenant to a house or land. *Chapman v. Jones*, L. R., 4 Ex. 281.

The freehold of pews in a church, built under a private act, is not conferred on the owners of the pews unless there are express words in the act to that effect, otherwise they take a mere easement. *Brumfit v. Roberts*, L. R., 5 C. P. 224; *Greenway v. Hockin*, *Id.* 235.

It seems that the Prescription Act, 2 & 3 W. 4, c. 71, does not apply to pews. See *Crisp v. Martin*, *ante*, p. 843.

It must be borne in mind that the cases above cited refer to pews in parish churches built before the year 1818. Seats and pews in churches built after that year are let and assigned according to the provisions of 58 G. 3, c. 45, ss. 75, 76; 3 G. 4, c. 72, ss. 23—25; 1 & 2 W. 4, c. 38, ss. 4, 21, 22; 14 & 15 V. c. 97, s. 1; and 19 & 20 V. c. 104, ss. 5—8.

ACTION FOR DECEIT AND MISREPRESENTATION.

An action will lie, in respect of a false and fraudulent representation, made by the defendant to the plaintiff, intended to be acted on by him, and on which he has acted, and thereby suffered damage. *Pasley v. Freeman*, 3 T. R. 51. See S. C., 2 Smith's L. Cas. *in notis*. The representation must be as to an existing fact, and not a mere expression of opinion. *Bellairs v. Tucker*, 13 Q. B. D. 562. A statement, however, by A. of his opinion to B., where the facts are known better to A. than to B., may involve an implied statement that A. knows facts to justify his opinion. *Smith v. Land and House Property Cor.*, 28 Ch. D. 7, C. A. And a misstatement of the intention of the defendant in doing a particular act may be a misstatement of fact; *Edgington v. Fitzmaurice*, 29 Ch. D. 459, C. A.; for "the state of a man's mind is as much a fact as the state of his digestion;" *Id.* 483, *per* Bowen, L. J. See also *Levett v. Hamblet*, (1901) 2 K. B. 72, *per* Romer, L. J.

It is now settled that in order, apart from statute, to maintain this action there must be proof of fraud: a false statement made in the honest belief that it is true is not sufficient: *Peck v. Derry*, 14 Ap. Ca. 337, D. P.; *Glazier v. Rolls*, 42 Ch. D. 436, C. A.; *Ormrod v. Huth*, 14 M. & W. 651, Ex. Ch.; for there is no such thing as legal fraud in the absence of moral fraud. *Jolliffe v. Baker*, 11 Q. B. D. 255; *In re Banister*, 12 Ch. D. 131, 147, *per* Brett, L. J.; *Peck v. Derry*, 14 Ap. Ca. 346, 356, *per* Lds. Bramwell and Fitzgerald. "And making a false statement through

want of care, falls far short of, and is a very different thing from fraud, and the same may be said of a false representation believed in, but on insufficient grounds." *Id.*, per Ld. Herschell, *Angus v. Clifford*, (1891) 2 Ch. 449, C. A.; *Low v. Bouverie*, (1891) 3 Ch. 82, C. A. But where there is a legal obligation on the part of the defendant to the plaintiff to give him correct information, as where there is a warranty, or an estoppel arises, the defendant may be liable on his innocent misstatements. S. C. And a false statement made through carelessness, and without reasonable belief that it is true, though not amounting to fraud, may be evidence of it; and fraud is proved where it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false; and if fraud be proved the defendant's motive is immaterial,—it matters not that there was no intention to injure the person to whom the statement was made. *Peek v. Derry*, 14 Ap. Ca. 369, 374, per Ld. Herschell, after reviewing all the prior cases on the subject. See also judgments in *Le Lievre v. Gould*, (1893) 1 Q. B. 491, C. A., cited *ante*, p. 800.

A misconception of law by the plaintiffs, owing to misrepresentation thereof by the defendants, will give no right of action; *Eaglesfield v. Londonderry, Ms. of*, 4 Ch. D. 693, C. A.; W. N. 1878, p. 98; 38 L. T. 303, D. P.; unless the misrepresentation be fraudulent; see *Hirschfeld v. L. Brighton & S. C. Ry. Co.*, 2 Q. B. D. 1, cited *ante*, p. 663. Misrepresentation by directors of the powers conferred on them by the private Act of Parliament under which their company is incorporated, made knowingly, is actionable if damage result therefrom. *W. London Commercial Bank v. Kitson*, 13 Q. B. D. 360, C. A.

Where the proprietor of a house instructed an agent to obtain a tenant for it, without telling him of a nuisance which lowered the value of the premises; the agent, in answer to a question from the person to whom the house was let, said there were no objections to it; it was held that there was no evidence of fraud on the part either of the landlord or his agent. *Cornfoot v. Foulke*, 6 M. & W. 358. But where a contract is based on a material statement made by the defendant, innocently, but which is in fact untrue, the contract will be set aside; and the defendant will be ordered to return money paid him thereunder by the plaintiff A., with interest thereon, *Karberg's case*, (1892) 3 Ch. 1, C. A.; *Newbigging v. Adam*, 34 Ch. D. 582, C. A., and further to indemnify A. against obligations which A. has contracted under the contract set aside, as in the case of a partnership contract. S. C. On appeal, 13 Ap. Ca. 308, D. P., a more limited indemnity was prayed for and decreed. It is no answer to such rescission that the business restored is worse than worthless. S. C. And the contract being rescinded, the defendant cannot recover against the plaintiff for goods sold or money lent to the partnership. S. C. See further as to indemnity, *Whittington v. Scale Hayne*, 82 L. T. 49, H. T. (1900), Ch. As to election to confirm the sale see *Law v. Law*, *post*, p. 845. In the absence of fraud, however, a contract will not be set aside for misrepresentation where there cannot be *restitutio in integrum*. *Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch. 392, C. A. Nor where the contract has been executed, whether it be for the sale of land, *Wilde v. Gibson*, 1 H. L. C. 605; *Brownlie v. Campbell*, 3 Ap. Ca. 936, 937, per Ld. Selborne, C.; or shares; *Seddon v. N. E. Salt Co.*, (1905) 1 Ch. 326, unless there has been such misdescription as is sufficient to annul the whole contract. *Debenham v. Sawbridge*, (1901) 2 Ch. 98, *ante*, p. 330, see also *A.-G. v. Ray*, L. R. 9 Ch. 397. See further *Kennedy v. Panama & R. Mail Co.*, L. R. 2 Q. B. 580, 587, *per cur.*, cited *ante*, p. 614, and Dart, V. and P. 7th ed., pp. 807-8. As to how far it is the duty of the defendant to disclose facts known to him affecting

the subject-matter of the contract, see *Turner v. Green*, cited *ante*, p. 283. As to the duty of a partner A. to his co-partner B., on the sale by B. to A. of B.'s share of the partnership business, to disclose all he knows as to the partnership accounts, see *Law v. Law*, (1905) 1 Ch. 140, C. A.

By the Partnership Act, 1890, 53 & 54 V. c. 39, s. 41: "Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled: (a) to a lien, on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership and for any capital contributed by him, and is (b) to stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities, and (c) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm."

In the case of fraud, there is joint and several liability to restore money fraudulently taken. *Ex pte. Adamson*, 8 Ch. D. 807, 815, *per James, L.J.* See also 53 & 54 V. c. 39, ss. 10—12, *ante*, pp. 510, 511.

Where fraud is relied on, it must be distinctly alleged and proved, although it is not necessary to use the word fraud. *Davy v. Garrett*, 7 Ch. D. 473, 489, *per Thesiger, L. J.* And the words "falsely and fraudulently," may be struck out of the statement of claim, provided there is a good cause of action left. *Thom v. Bigland*, 8 Exch. 725, 730; 22 L. J., Ex. 243, 245, *per Parke, B.*; *Swinfen v. Chelmsford, Ltd.*, 5 H. & N. 890, 921; 29 L. J., Ex. 382, 397.

Where R., by fraudulent misrepresentation, induced B. to do an act, which in consequence of such misrepresentation B. believed to be innocent, but which was in fact criminal, B. may sue A. for such damages as he has sustained by so acting. *Burrows v. Rhodes*, (1899) 1 Q. B. 816. See also *Dixon v. Fawcus*, 30 L. J., Q. B. 137. Where evidence has been given, that a representation was made by the defendant, false to his knowledge, he may, of course, as in other cases, be called as a witness to rebut the evidence, notwithstanding the decision imputed to Jessel, M. R., in *Hine v. Campion*, 7 Ch. D. 344, to the contrary. See observations of Ld. Bramwell in *Peck v. Derry*, 14 Ap. Ca. 347.

As to the liability of the executors of the person who made the misrepresentation, *vide* Part III. *Actions against Executors*, *post*, p. 1154.

With respect to the liability of A. for the fraud of another person, A. is liable for the fraudulent representations made by his agent, B., in the course of carrying on A.'s business, for his benefit. *Barwick v. English Joint Stock Bank*; *Mackay v. Commercial Bank of New Brunswick*; *Swift v. Jewsbury*, cited *post*, p. 851; *Swire v. Francis*, 3 Ap. Ca. 106, P. C. See also *Udell v. Atherton*, 7 H. & N. 172; 30 L. J., Ex. 337; *Archbold v. Howth, Ltd.*, 1 R., 1 C. L. 608, C. P.; and notes to *Pasley v. Freeman*, 2 Smith's L. C. But A. is not liable in any other case. *Weir v. Barnett*, 3 Ex. D. 32; *Weir v. Bell*, *Id.* 238, C. A. Thus, where the directors of a company appoint brokers to act on behalf of the company, the directors are not liable for fraud of the brokers to which they were not privy. S. CC.: *accord. Cargill v. Bower*, 10 Ch. D. 502, explaining *Peck v. Gurney*, L. R., 6 H. L. 377. Even although they subsequently, with notice of the fraud, receive part of the proceeds thereof in payment of debts due to them from the company. *Weir v. Barnett*, *supra*. But in *Weir v. Bell*, 3 Ex. D. 247, *et seq.*, C. A., Cockburn, C.J., and Brett, L.J., were of opinion that the defendants would in the latter case be liable. A principal A., is not liable for fraudulent misrepresentations of his agent B., which are unauthorized, and made, not for A.'s benefit, but for B.'s own private ends. See *British*

Mutual Banking Co. v. Charnwood Forest Ry. Co., and other cases cited, *post*, p. 849.

As to the liability of partners for the representation of their co-partner, see the Partnership Act, 1890, 53 & 54 V. c. 39, ss. 10—12, *ante*, pp. 510, 511. By *Id.* sect. 15, “an admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm.”

A false statement published in a prospectus, advertisement, &c., with the fraudulent intention, that it should be read and acted upon by the plaintiff, will, if so read and acted on by him, entitle him to sue for the damages he has sustained, which naturally result from him so acting; *Gerhard v. Bates*, 2 E. & B. 476; 22 L. J., Q. B. 364; *Richardson v. Silvester*, L. R., 9 Q. B. 34. Thus the manager, and assistant manager, of a joint-stock banking company, were held liable for fraudulent statements, contained in reports presented by the directors, at the annual meetings, to the shareholders, whereby a shareholder was induced to purchase more shares in the bank. *Cullen v. Thomson's Trustees*, 4 Macq. 424. Where the directors of a mining company caused a prospectus to be circulated, grossly misrepresenting the real purchase-money paid for the sett, so as to convey an impression of great value, they were held liable to a shareholder, who had taken up shares in the company on the faith of the false statements, although he might have had other inducements to buy. *Clarke v. Dickson*, 6 C. B., N. S. 453; 28 L. J., C. P. 225; *Edgington v. Fitzmaurice*, 29 Ch. D. 459, C. A. But the misrepresentation must be shown to have materially influenced the plaintiff. *S. CC.*; *Moore v. Burke*, 4 F. & F. 258, *cor.* Cockburn, C.J.; *Smith v. Chadwick*, 20 Ch. D. 27, C. A.; 9 Ap. Ca. 187, D. P.; *Smith v. Land and House Property Cor.*, 28 Ch. D. 7, C. A.; and see *Arnison v. Smith*, 41 Ch. D. 348, 368, C. A. As to the effect of a subsequent circular correcting the misrepresentation, *vide*, S. C. Where a prospectus contains several misstatements, it is sufficient that it influenced the plaintiff as a whole. *Aaron's Reefs v. Twiss*, (1896) A. C. 273, 280, *per* Ld. Halsbury, C.; *McConnel v. Wright*, (1903) 1 Ch. 546, 551, *per* Collins, M.R. As to the advertisements which injure the plaintiff's trade, see *Ajello v. Worsley*, (1898) 1 Ch. 274. The construction of the written representation is, as in other cases, for the judge. *Bellairs v. Tucker*, 13 Q. B. D. 562.

The right of action by a shareholder against a company, in respect of fraudulent misrepresentations by which he was induced to take worthless snares of the company, is considered, *post*, p. 1113.

In the case of a prospectus or notice issued by the promoters, directors, &c., of a Company, registered under the Companies Act, 1862, inviting subscriptions to shares or debentures in the company, which prospectus contains statements in fact untrue, the Directors' Liability Act, 1890 (53 & 54 V. c. 64), s. 3, in general provides that the promoters, &c., shall be liable to pay compensation to all persons who shall subscribe for any shares, &c., on the faith of such prospectus, &c., for the loss or damage they may have sustained by reason of any untrue statement therein, with provisos enabling the promoters, &c., in certain cases to discharge themselves from liability by proof of reasonable belief in its truth. Sect. 4 provides for the indemnity of any person whose name has been published as a director, not being such, against damages, costs, &c., to which he has been liable in consequence of such publications. And sect. 5 provides for contribution between directors, as to payments to which any one of them may become liable under this act. As to what contribution is recoverable, and the evidence in support of it, see *Shepherd v. Bray*, (1906) 2 Ch. 235. It may be obtained by third-party proceedings in the original action: see *Gerson v. Simpson*, (1903) 2 K. B. 197, C. A. See as to contribution generally, *ante*, pp. 594, 595.

Under sect. 3 (1 *a.*) directors will be liable to a person who has suffered damage by taking shares on the faith of a prospectus which contains untrue statements, where they do not prove that they had reasonable grounds for believing the truth of such statements; *Greenwood v. Leather Shod Wheel Co.*, (1900) 1 Ch. 421, C. A.; so where it omits a statement of material facts known to them, but which they believe not to be material. *Shepherd v. Broome*, (1904) A. C. 342, D. P. Withdrawal after action brought, by the director of his consent to the issue of the prospectuses, is too late. *Dringbier v. Wood*, (1899) 1 Ch. 393. The damages must be connected with the misrepresentation. *Broome v. Speak*, (1903) 1 Ch. 586, 610, *per* Collins, M.R. They are limited to the amount paid for the shares; that amount is *prima facie* taken to be the equal value, at the date of allotment, of the shares having the advantages stated in the prospectus; the damages are the diminution of that value owing to those advantages being absent. *McConnel v. Wright*, (1903) 1 Ch. 546, C. A.; *Broome v. Speak*, *supra*; if therefore the shares are valueless the damages are the whole price paid for them. See *Twyecross v. Grant*, 2 C. P. D. 469, C. A. As to the effect of ratification of a prospectus issued by the company not within sect. 3 (2), without the authority of the defendant director: see *Hoole v. Speake*, (1904) 2 Ch. 732. The action is for compensation, not for a penalty, and is not therefore barred by the lapse of two years. *Thomson v. Ld. Clanmorris*, *ante*, p. 757. It seems that the action is under 21 J. 1, c. 16, s. 3, *ante*, p. 678, barred after six years from the date of the plaintiff's application for shares. S.C. As to the liability under this act of the estate of a deceased director, *vide post*, pp. 1154, 1155.

The Companies Act, 1900, 63 & 64 V. c. 48, s. 10 (replacing the Companies Act, 1867, s. 38), prescribes with great minuteness the particulars that must, in the case of every company registered under the Companies Act, 1862, be stated in every prospectus issued by or on behalf of the company "or by or on behalf of any person who is or has been engaged or interested in the formation of the company," these particulars are of too special a character to be set out here. By sect. 10 (5) "any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section or purporting to affect him with notice of any contract document or matter not specifically referred to in the prospectus shall be void." By sect. 10 (8) "Nothing in this section shall limit or diminish any liability which any person may incur under the general law apart from this section." There seems little doubt that, subject to certain limitations stated in sect. 10 (7), failure to comply with the requirements of this section, renders the persons issuing the prospectus liable to an action for breach of a statutory duty, at the suit of any person who having taken shares on the faith of the prospectus has sustained loss by reason of such non-compliance, and that in such action the amount of the loss is recoverable as damages. *Cf. Marshall v. Morrison*, (1907) W. N. 28, *cor.* Warrington, J.

With reference to fraudulent misrepresentations, made to persons other than the plaintiff, whereby the plaintiff has been deceived, the rule is, that a person is responsible for the consequences of a false representation, made by him to another, on which a third person acts, provided that the representation was made with the direct intent that it should be acted on by such third person, in the manner that occasions the injury, and that the injury be the immediate consequence of the representation: *Peck v. Gurney*, L. R., 6 H. L. 377, 412, 413, *per* Ld. Cairns, following *Barry v. Croskey*, 2 J. & H. 1, 23, *per* Wood, V.-C. Thus, where the defendant sold a gun to A. "for the use of himself and his sons," and "falsely and fraudulently" warranted its soundness, knowing it to be unsound; the defendant was held liable to an action by A.'s son, for an injury done to him by its bursting, though the contract of sale was between A. and the defendant only. *Langridge v. Levy*,

2 M. & W. 519; Ex. Ch. 4 M. & W. 337. So, where the directors of a bank issued a report known by them to be false, in form addressed to the shareholders, but intended for the information of any person desiring to deal in the shares of the bank, and the plaintiff, through a broker, obtained a copy, and was thereby induced to purchase shares; it was held, he was entitled to sue for the loss he had thereby suffered; *Scott v. Dixon*, 29 L. J. Ex. 62, n. Where, however, the act of the plaintiff, which had caused him the injury, is not directly induced by the representation of the defendant, although it was made by him, with the intent that it should be so acted on, no action will lie. *Peck v. Gurney*, L. R., 6 H. L. 377. Thus, where the prospectus of a company was issued, containing representations intentionally false, and all the shares were thereupon taken up, and the plaintiff, relying on those representations, afterwards bought shares in the market, and thereby suffered loss, it was held, that the plaintiff could not sue on the false representations, for as he had not received the prospectus from those who were answerable for it, he could not treat them as made personally to himself; S. C., explaining *Gerhard v. Bates*, ante, p. 846, and *Scott v. Dixon*, supra, and overruling *Bedford v. Bagshaw*, 29 L. J., Ex. 59, and *Bagshaw v. Seymour*, *Id.* 62, n. See also, *Barry v. Croskey*, ante, p. 847. It is otherwise, however, if such prospectus were issued for the purpose of influencing the purchase, by the plaintiff, to whom it was sent, of shares in the market, and it had that effect. *Andrews v. Mockford*, (1896) 1 Q. B. 372, C. A. So, where it was afterwards supplemented by false statements to the same effect on which the plaintiff took action. S. C.

An incorporated company is liable to an action for the fraudulent misrepresentation of their agent acting in the course of the business with which the company has entrusted him, and for their benefit; *Barwick v. English Joint-Stock Bank*, L. R., 2 Ex. 259, Ex. Ch.; *Mackay v. Commercial Bank of New Brunswick*, L. R., 5 P. C. 394; *Swift v. Jewsbury*, L. R. 9 Q. B. 301, 312, per Coleridge, C.J., Ex. Ch.; and is liable in damages, at any rate, to the extent to which the company has profited, by the fraudulent representation of the agent. *Weir v. Bell*, 3 Ex. D. 244, per Bramwell, L.J. In *Swift v. Jewsbury*, supra, the dicta of Lds. Chelmsford and Cranworth in *Addie v. W. Bank of Scotland*, L. R., 1 H. L., Sc. 145, 158, 167, to the effect, that the action could be brought only against the directors, or other agents, who had made the false statements, and not against the company, were dissented from, and it was pointed out that they were not material to the decision of the case. These dicta were further explained in *Houldsworth v. City of Glasgow Bank*, 5 Ap. Ca. 317, D. P. See further *National Exchange Co. of Glasgow v. Drew*, 2 Macq. 103; *McGowan v. Dyer*, L. R., 8 Q. B. 141; and cases cited Part III., sub. tit. *Actions by and against companies—Special defences in actions for calls—Fraud and misrepresentation*, post, pp. 1107, 1108. Evidence of similar frauds, committed on other persons, by the same agent of the defendant company, in the same manner, with the knowledge and for the benefit of the company, is admissible to prove fraud. *Blake v. Albion Life Assur. Co.*, 4 C. P. D. 94. In like manner, on the question of fraud, other false statements in the same business, made by defendant, may be submitted to the jury, but not as distinct causes of action. *Huntingford v. Massey*, 1 F. & F. 690. And the defendant may show representations made by him to others, with the view of proving his own *bona fides*. *Shrewsbury v. Blount*, 2. M. & Gr. 475. In an action for a false representation as to the trustworthiness of W., the defendant having been proved at about the time of the representation, to have bought goods from W. under cost price, was allowed to ask his shopman, and other tradesmen of the town, in which W. carried on business, as to their belief in W.'s trustworthiness at the time the representation was made. *Sheen v. Bumpstead*, 2 H.

& C. 193; 32 L. J., Ex. 271, Ex. Ch. The company are not liable where the agent acted beyond his authority for his private ends, and not for the benefit of the company: *British Mutual Banking Co. v. Charnwood Forest Ry. Co.*, 18 Q. B. D. 714, C. A.; provided the act be not within the scope of his apparent authority, see *Ruben v. Gl. Fingall Consolidated*, (1901) 2 K. B. 712, *per* C. A., *aff.* (1906) A. C. 439, D. P. See also *George Whitechurch v. Cavanagh*, *post*, p. 1120.

The plaintiff must prove actual damage to himself, in order to maintain the action. *Hyde v. Bulmer*, 18 L. T. 293, E. T. 1868, C. P.

[*Damages.*] Costs incurred upon the discovery of the falsehood of a representation, in order to reverse the consequences thereof, are too remote an injury to be included in an action of fraud. S. C. See further as to damages, *ante*, pp. 491 *et seq.*

Where the plaintiff was induced by the fraud of the defendant to take up shares, the damages recoverable are the difference between the price paid for them, and their *real* value on allotment; this value is not the market value; it may be ascertained by the light of subsequent events, *e.g.*, the estimated dividend on a liquidation of the company. *Peek v. Derry*, 37 Ch. D. 541, C. A. (the judgment in this case was reversed in D. P. on the ground that there was no fraud; 14 Ap. Ca. 337). Thus, where the shares were really worthless, the plaintiff recovers the full amount he paid for them, although they had, when he took them, a market value. *Twycross v. Grant*, 2 C. P. D. 469, C. A. The plaintiff is not, in such cases, bound to realize his shares in order to ascertain his damage. S. C.; *Peek v. Derry*, *supra*. Where, however, the fraud of the defendant was, that he induced L. to believe that the rupee paper, which L. had directed him to buy, was bought from third persons, whereas the defendant sold L. rupee paper of his own, the damages were held to be the difference only, between the price L. had paid, and what he would have received, if he had resold it in the market, forthwith after purchasing it. *Waddell v. Blockey*, 4 Q. B. D. 678, C. A. The plaintiff may recover damages for any injury which is the direct and natural consequence of his acting on the faith of the defendant's fraudulent representations. *Mullett v. Mason*, L. R., 1 C. P. 559. A cattle dealer sold the plaintiff a cow, and fraudulently represented it was free from infectious disease; the plaintiff placed it with five others, and they caught the disease and died; it was held that the plaintiff was entitled to recover, as damages, the value of all the cows. S. C. See also *Smith v. Green*, and *Randall v. Newson*, cited *ante*, p. 492.

As to the defendant's liability for the costs of an abortive action the plaintiff was induced to bring by reason of the defendant's misrepresentation, see *Richardson v. Dunn*, 8 C. B., N. S. 655; 30 L. J., C. P. 44, and cases cited *ante*, p. 493.

The causes of action under this head are various. The cases which most commonly occur in practice are misrepresentation of the value of property, and misrepresentation of solvency or character. Actions for misrepresentation of authority have been considered *ante*, pp. 493 *et seq.*

Where C. bribes A. to induce his principal P. to buy T's goods on disadvantageous terms, and A. does so successfully, P. may recover the bribe from A., and also sue C. alone, or A. and C. jointly, for the loss he has sustained, without allowing any deduction in respect of the amount recovered from A. *Salford, Mayor, &c. of v. Lever*, (1891) 1 Q. B. 168, C. A. See *Grant v. Gold Exploration, &c. Syndicate*, (1900) 1 Q. B. 233, C. A.

Perjury causing damage to the plaintiff gives no ground of action, whether it be committed by a witness; *Dumport v. Sympton*, Cro. Eliz. 520; or a deponent in an affidavit. *Eyres v. Sedgewicke*, Cro. Jac. 601.

Where a false statement was, by way of a practical joke, made by the defendant, D., to the plaintiff, W., a married woman, that her husband had met with a serious accident, intending that she should believe it to be true, and she did so believe, and thereby sustained a severe nervous shock causing her illness, it was held that W. had a good cause of action against D. *Wilkinson v. Downton*, (1897) 2 Q. B. 57. *Accord. Dulieu v. White*, (1901) 2 K. B. 683, *per* Phillimore, J.

Misrepresentation of the value of property.] Most of the cases arising from misrepresentation in the value of property will be found *ante*, pp. 843 *et seq.* Where the vendor of a public-house, fraudulently misrepresents the amount of business done in it, whereby the plaintiff is induced to buy the house, an action will lie, although such statement was not contained in the conveyance or memorandum of the bargain. *Dobell v. Stevens*, 3 B. & C. 623; *Pilmore v. Hood*, 5 N. C. 97. Where A. agreed to sell a brewery to B. or his nominee, on the basis that the profits had been of a certain amount, and B. agreed to sell it to C. at an enhanced price without any stipulation as to the profits, and A. by B.'s direction conveyed it to C., it was held that B. and C. could not join in suing A. to set aside the original contract on the ground that the profits were insufficient, on the terms of returning the brewery, for B. had no interest in the brewery, and C. had no right as against A. *Edinburgh United Breweries v. Molleson*, (1894) A. C. 96, D. P. Where the promoter P. of a company is liable for the fraudulent resale to it of property bought by P. for the purpose of such resale, the measure of damages is the profit so obtained by P. *In re Leeds and Hanley Theatres, &c.*, (1902) 2 Ch. 809, C. A. See further, *ante*, p. 603.

Where a chattel is sold with all faults, the seller is not liable to an action in respect of latent defects, which he knew of, without disclosing at the time of sale; *Baglehole v. Walters*, 3 Camp. 154; *Hard v. Hobbs*, 3 Q. B. D. 150, C. A.; 4 A. P. Ca. 13, D. P.; unless he misrepresented the condition of the chattel, so as intentionally to deceive the purchaser, as an individual, or as one of a class, or one of the public; S. C.; 3 Q. B. D. 157, *per* Bramwell, L.J.; *Schneider v. Morris*, 3 Camp. 506, or unless he used means to prevent the purchaser from discovering its condition: S. C.; in either of which cases the vendor would be liable.

Misrepresentation of solvency, &c.] An action lies for making a false and fraudulent representation of the character, or solvency of another (under circumstances from which it may be assumed, that the party making the representation, intended it to be acted upon), whereby the plaintiff had been induced to give credit to him, and has suffered loss. *Pasley v. Freeman*, 3 T. R. 51; 2 Smith's L. C.; *Pontifex v. Bignold*, 3 M. & Gr. 63.

By *Ld. Tenterden's Act* (9 G. 4, c. 14), s. 6, "no action shall be brought, whereby to charge any person upon, or by reason of any representation, or assurance, made or given, concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose, that such other person may obtain credit, money, or goods upon,* unless such

* *Sic.* It is evident that some mistake has here crept into the parliament roll. See *Lyde v. Barnard*, 1 M. & W. 101, 115, 123. *Ld. Abinger, C.B.*, thought that the word "upon" should be rejected as surplusage; *Id.* pp. 123, 124; while *Parke, B.*, suggested that words should be transposed, so as to read thus:—"to the intent or purpose that some other person may obtain money or goods upon credit;" or that others should be interpolated, so as to read thus:—"to the intent or purpose to obtain credit, money, or goods on such representation."—*Id.* 115, 116.

representation or assurance be made in writing, signed by the party to be charged therewith." A defence under this section must now be pleaded specially. See Rules, 1833, O. xix., r. 15, *ante*, p. 309.

When the defendant stated that the plaintiff might safely trust A. B., because the defendant had the title-deeds of an estate of A. B., this was held to be within the above section. *Swann v. Phillips*, 8 Ad. & E. 457. A representation made respecting the credit of a firm, of which the defendant is a partner, is within the act. *Devanx v. Steinkeller*, 6 N. C. 84. In *Lyde v. Barnard*, 1 M. & W. 101, the court were divided on the point, whether a representation that the life estate of A. B. was charged with only three annuities, was a representation relating to the credit and ability of A. B., within the act. See further *Clydesdale Bank v. Paton*, (1896) A. C. 381, D. P. If the false representation, signed by the defendant, substantially conduced to the obtaining of the credit, he is liable, although the plaintiff might possibly have been influenced by other representations, which are inadmissible, through not being in writing. *Talton v. Wade*, 18 C. B. 371; 25 L. J., C. P. 240, Ex. Ch. The plaintiff may sue, on a fraudulent misrepresentation made to his bankers, in answer to questions put by them at his request, and acted on by him. *Swift v. Jewsbury*, L. R., 9 Q. B. 301, Ex. Ch.

The signature of an agent will not satisfy the section; S. C.; nor will that of the manager of a banking co-partnership, registered under 7 G. 4, c. 46; S. C.; nor of a company under the Companies Act, 1862. *Hirst v. W. Riding Union Banking Co.*, (1901) 2 K. B. 560, C. A. And, one partner signing in the name of, and by the express authority of his firm, will make himself only, liable. *Mason v. Williams*, 28 L. T. 232, Feb. 1873, C. P.

ACTION FOR DEFAMATION.

There is a well-known legal distinction between written and spoken slander. Slandorous words spoken and published, but not committed to writing, are actionable only when they charge the plaintiff with a criminal offence (*vide infra*), or allege that he has a disease rendering him unfit for society, or attack him in relation to his trade or calling, or when, besides being clearly defamatory, they have caused to the plaintiff some particular damage, or by the Slander of Women Act, 1891 (54 & 55 V. c. 51), in the case of a woman, that they impute unchastity or adultery. But in the case of words, published by writing, it is only necessary that they should be calculated to degrade or disparage the plaintiff, and hold him up to hatred, ridicule, or contempt, in order to make them actionable. As, however, the pleadings in cases both of written or spoken slander are often very similar, it will be most convenient to consider the evidence of defamation, written or spoken, under one general heading.

Words imputing to the plaintiff a criminal offence, for which he was liable to imprisonment, are actionable, even although the offence is not indictable. *Webb v. Beavan*, 11 Q. B. D. 609.

As to joinder of plaintiffs in this action, *vide ante*, pp. 89, 90, and *Booth v. Briscoe*, *post*, p. 863.

Judgment for the defendant in an action on part of one connected libel is a bar to another action brought in respect of another part. *Macdougall v. Knight*, 25 Q. B. D. 1, C. A.

The rules as to opening the plaintiff's case, and the evidence thereon, when the libel is denied and also justified, will be found *ante*, pp. 277, 278.

Proof of introductory averment, &c.] All introductory averments essential to the plaintiff's case, must be proved when denied upon the pleadings. Where the words are alleged to have been spoken of, and concerning, the plaintiff, in a particular character, and are only actionable as having been spoken of the plaintiff in that character, such character must, if denied, be proved; but if the character be immaterial, or be not traversed, no evidence need be given of it. *Lewis v. Walter*, 3 B. & C. 138, n.; *Cox v. Thomason*, 2 C. & J. 361; Rules, 1883, O. xix., rr. 15, 17, *ante*, p. 309. And, where the words themselves admit the plaintiff's character, evidence of it is unnecessary. *Yrisarri v. Clement*, 3 Bing. 432; *vide ante*, p. 66. Where the plaintiff was described as assistant overseer, proof that he is acting in that capacity was held sufficient. *Cannell v. Curtis*, 2 N. C. 228. Where the words are spoken of several plaintiffs in trade, their joint trading must be proved. See *Le Fanu v. Malcolmson*, 1 H. L. C. 637.

The 21 & 22 V. c. 90, s. 27, *ante*, p. 512, provides means of proving the plaintiff's medical qualification. The books of a university (duly authenticated), conferring the degree of doctor of laws, are evidence to prove that fact. *Moises v. Thornton*, 8 T. R. 303, 306, 307, *per* Ld. Kenyon. See also *Collins v. Carnegie*, 1 Ad. & E. 695.

In order to prove that the plaintiff is a solicitor (where the libel does not admit it), an examined copy of the roll of solicitors is sufficient. So, the book from the master's office, containing the names of all the solicitors, produced by the officer in whose custody it is kept, is good evidence, together with proof that the plaintiff practised as a solicitor at the time of the libel. *R. v. Crossley*, 2 Esp. 526; *Lewis v. Walter*, 3 B. & C. 138. The certificate need not be produced, if the libel do not relate to it. *Jones v. Stevens*, 11 Price, 251. The stamp office certificate, countersigned by the master of the court, was held sufficient *prima facie* evidence of the party being an attorney. *Sparling v. Haddon*, 9 Bing. 11. Since the 6 & 7 V. c. 73, the stamp office certificate is not countersigned; but the registrar's certificate, indorsed by the stamp office, or a copy of the register of solicitors or the Law List would seem to be now evidence. *Vide ante*, p. 508.

Where the title to the particular situation is not the subject of any express documentary appointment, the acting in the situation, is of course the proper evidence. 2 Stark. Ev., 3rd ed., 627. And when the plaintiff averred, that he was employed by "The New England Company," and that the libel was published of him, in such employment, it was held sufficient to prove that the company was commonly so called, though that was not its legal name. *Rutherford v. Evans*, 6 Bing. 451.

Whether the words are spoken of the plaintiff in a particular character is for the jury; *Jones v. Littler*, 7 M. & W. 423; and if the words be such, as must be injurious to the plaintiff as a trader (*e.g.*, words imputing insolvency), it is then needless to prove them spoken of him *as such*. S. C. In an action for saying of the plaintiff in his trade of a brewer, that he had been bankrupt at C., it was proved that he had been a brewer at O.; held, the place where the bankrupt became bankrupt was immaterial; he might have become a bankrupt whilst a brewer at O. by an act of bankruptcy committed at C. *Hall v. Smith*, 1 M. & S. 287; *Figgins v. Cogswell*, 3 M. & S. 369; *Rutherford v. Evans*, *supra*.

Words spoken in reference to the plaintiff's office, trade, or business must, in order to be actionable *per se*, either show the want of some general requisite, as honesty, capacity, fidelity, &c., or connect the imputation with the office, &c. *Lumby v. Allday*, 1 Cr. & J. 301; *Dauncey v. Holloway*, (1901) 2 K. B. 441, C. A. Thus, words imputing incontinence to a physician, *Ayre v. Craven*, 2 Ad. & E. 2; or a clergyman, unless holding a benefice or some clerical office, &c., producing temporal profit; *Gallwey v. Marshall*,

9 Exch. 294; 23 L. J., Ex. 78; are not actionable *per se*. Nor before stat. 54 & 55 V. c. 51, *ante*, p. 851, were words imputing incontinence to a school mistress: *Wharton v. Brook*, 1 Vent. 21, *per* Twisden, J. And where the office is one of honour or credit only, and not of profit, words showing unfitness are not actionable, unless it be such as to render the holder liable to be deprived of the office. *Alexander v. Jenkins*, (1892) 1 Q. B. 797, C. A. On the other hand, words imputing dishonesty or malversation in such an office are actionable. *Booth v. Arnold*, (1895) 1 Q. B. 571, C. A. So, to say of the master of a foreign-going ship, possessed of a certificate under the Merchant Shipping Act, 1894, that during his stay at a port he was drunk, and had to be carried to his boat to reach his vessel; *Irwin v. Brandwood*, 2 H. & C. 960; 33 L. J., Ex. 257; or, of a gamekeeper, whose duty it is, not to kill foxes, and who is employed on the terms that he should not kill foxes, that he killed foxes; *Foulger v. Newcomb*, L. R., 2 Ex. 327; is actionable without special damage. See *Riding v. Smith*, 1 Ex. D. 91, cited with comment thereon, *post*, p. 880.

Proof of the libel.] The plaintiff must set out the actual words of the libel, it is not sufficient to state merely their substance. *Harris v. Warre*, 4 C. P. D. 125. A mere omission in setting out part of a libel is not fatal, unless the sense of that which is set out is thereby varied; *Tabart v. Tipper*, 1 Camp. 353; but where the words alleged are materially qualified by the context, although the whole is libellous, there is, subject to amendment, a fatal variance. *Rainy v. Bravo*, L. R., 4 P. C. 287; *Cartwright v. Wright*, 5 B. & A. 615; *R. v. Solomon*, Ry. & M. 253; *Stace v. Griffith*, L. R., 2 P. C. 420; *Brembridge v. Latimer*, 12 W. R. 878, T. T. 1864, C. P.

Where the original libel has been lost or destroyed, secondary evidence may be given of it: *Rainy v. Bravo*, *supra*; unless it is contained in a letter, or official document, which is privileged from production on the ground of public policy, in which case, the plaintiff is precluded from producing secondary evidence of contents of that document. *Darkins v. Rokeby, Ltd.*, L. R., 8 Q. B. 255; Ex. Ch. and other cases cited *ante*, p. 173. As to the use of an affidavit of defendant filed in the cause, in reply to an application for inspection, as an admission of the libel, see *Rainy v. Bravo*, *supra*.

Whether a writing is a libel or not, is a question for the jury, and the judge is not bound to give an opinion on it: *Baylis v. Lawrence*, 11 Ad. & E. 920; but the proper course (and the usual practice), is for the judge to define what is a libel in point of law. *Parmiter v. Conpland*, 6 M. & W. 105. And it may be defined to be a publication, without justification or lawful excuse, calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule. *Per* Parke, B.; S. C. A writing may be a libel on a private person, which would not be so on a person in a public character or office; for the acts of public men which concern the subject, may be lawfully commented upon, without malice; but to impute bad or corrupt motives is a libel in either case. *Id.*, and see *Campbell v. Spottiswoode*, and *Merivale v. Carson*, cited *post*, p. 873. The test of whether a writing is a libel is "whether under the circumstances in which the writing was published, reasonable men, to whom the publication was made, would be likely to understand it in a libellous sense," and "not what was the intention with which" it was published. *Capital and Counties Bank v. Henty*, 7 Ap. Ca. 741, 745, 782. If it is not likely so to be understood, there is no evidence for the jury. S. C.; *Nerill v. Fine Art, &c. Co.*, (1897) A. C. 63, D. P. If, however, the words sued on are reasonably susceptible of a libellous construction, they should be left to the jury. *Hart v. Wall*, 2 C. P. D. 146; *Simmons v. Mitchell*, 6 Ap. Ca. 156, J. C. Words imputing suspicious only

that the plaintiff has committed murder are not actionable. S. C. A libel is not confined to writing or print, but may be expressed by pictures or signs. 5 Rep. 125 b. See *Carr v. Hood*, 1 Camp. 354, n.; *Du Bost v. Beresford*, 2 Camp. 512; *Jefferies v. Duncombe*, 11 East, 226; *Monson v. Tussaids*, (1894) 1 Q. B. 671, C. A. Fox's Act (32 G. 3, c. 60) applies only to criminal trials. *Baylis v. Lawrence*, ante, p. 853, per Ld. Denman, C.J.

In *Fray v. Fray*, 17 C. B., N. S. 603; 34 L. J., C. P. 45, the defendant, the plaintiff's brother, wrote a letter in which he charged her, with having unnecessarily made him a party to a chancery suit, and said that it was a pleasure to her to put him to all the expense she could; it was held that there was evidence of a libel for the jury. To write of a clergyman that he came to the performance of divine service "in a towering passion," and that "his conduct is calculated to make infidels of his congregation," is libellous. *Walter v. Brogden*, 19 C. B., N. S. 85. So to charge a man with ingratitude is libellous; *Cox v. Lee*, L. R., 4 Ex. 284; or to write that a person was at a past time in pecuniary difficulties, although it be also stated that those difficulties have been surmounted. *Id.*, per Kelly, C.B. A charge may be libellous, notwithstanding the facts upon which it is founded are also stated, and they do not support the charge. *Id.* It is a libel to publish in a newspaper a story of the plaintiff, calculated to make him ludicrous, though he may have previously told the same story himself. *Cook v. Ward*, 6 Bing. 409.

In *Evans v. Harlow*, 5 Q. B. 624, the declaration alleged that the plaintiff carried on the trade of an engineer, and sold, in the way of his trade, goods called "self-acting tallow syphons or lubricators," and the defendant published of the plaintiff in his said trade and as such inventor as follows:—"This is to caution parties employing steam power from a person, offering what he calls self-acting tallow syphons or lubricators, stating that he is the sole inventor, manufacturer, and patentee, thereby monopolizing high prices at the expense of the public. R. Harlow" (the defendant) . . . "takes this opportunity of saying that such a patent does not exist, and that he has to offer an improved lubricator," &c. . . . "Those who have already adopted the lubricators against which R. H. would caution, will find that the tallow is wasted instead of being effectually employed as professed;" these expressions being explained by appropriate innuendoes; it was held that the words were not a libel on the plaintiff, either generally, or in the way of his trade, but were only a reflection on the goods sold by him, which was not actionable without special damage. *Accord. White v. Mellin and Hubcock & Sons v. Wilkinson*, cited *post*, p. 880. But where the defendant wrote of a bag, introduced under the title of the "Bag of Bags," by the plaintiffs, "the title we think very silly, very slangy, and very vulgar; and which has been forced on the notice of the public *ad nauseam*," it was held (by Mellor and Hannen, J.J., *dissent. Lush, J.*) to be a question for the jury whether this language was not libellous, as casting an imputation on the plaintiff's conduct in their business. *Jenner v. A'Beckett*, L. R., 7 Q. B. 11. So it is a question for the jury whether the term "Ananias" applied to a newspaper, was intended to impute wilful falsehood to the manager and proprietor, or was used merely in an extravagant sense. *Australian Newspaper Co. v. Bennett*, (1894) A. C. 284, J. C. See *Ratcliffe v. Evans*, cited *post*, p. 880.

Where in an action by an author for an alleged libel in a criticism of his book, there is nothing in the libel which does not relate to the book, and the only question is whether the criticism is fair, the book must be put in by the party who desires to comment on it, and it seems that unless the criticism is necessarily on the face of it unfair, the book is part of the plaintiff's case. *Strauss v. Francis*, 4 F. & F. 939, per Erle, C.J.; S. C., *Id.*, 1107, per Cockburn, C.J.

A corporation (as a railway company) may be guilty of publishing a libel, and malice in law is presumed. *Whitfield v. S. E. Ry. Co.*, E. B. & E. 115; 27 L. J., Q. B. 229; *Gwynn v. Id.*, 18 L. T. 738, *cor.* Cockburn, C.J. Such libel may be published by its servant, acting in the course of his employment. *Citizen's Life Assur. Co. v. Brown*, cited *post*, p. 860. An incorporated trading company may sue in respect of a libel calculated to injure it in the way of its business, without showing special damage; *S. Helton Coal Co. v. N. E. News Assoc.*, (1894) 1 Q. B. 133, C. A.; even though the defendant is a member of the company. *Metropolitan Omnibus Co. v. Hawkins*, 4 H. & N. 87; 28 L. J., Ex. 201. But a corporation cannot sue for an alleged libel merely affecting the personal reputation of the corporators; thus a municipal corporation cannot sue on a writing charging it with corruption and bribery, as it cannot be guilty of these in its corporate capacity. *Manchester, Mayor, &c. of v. Williams*, (1891) 1 Q. B. 94.

[*Proof of publication of libel by defendant.*] A written libel is published when it is maliciously repeated or sung in the presence of others, or when the libel or any part thereof is delivered over to scandalize the party. 5 Rep. 125 a. Proof that the libel produced is in the defendant's handwriting, is said to be presumptive evidence of publication, so as to throw proof of non-publication upon him; *R. v. Beare*, 1 Ld. Raym. 417; *Lamb's case*, 9 Rep. 59 b. But see the arguments in *R. v. Burdett*, 3 B. & Ad. 717; and 4 B. & Ad. 95; and a libel may be found under circumstances which preclude such presumption. There is publication of a libel where defamatory matter is dictated by the defendant to his clerk, who takes it down in shorthand, and makes a full copy. *Pullman v. Walter Hill & Co.*, (1891) 1 Q. B. 524, C. A. So, where a clerk takes a press copy thereof. *S. C.* Printing a libel, unless qualified by circumstances, is said to be, *prima facie*, a publishing, for it must be delivered to the compositors and the other subordinate workmen; *Baldwin v. Elphinstone*, 2 W. Bl. 1038; but this proposition is denied in *Watts v. Fraser*, 7 Ad. & E. 223. Indeed the mechanical work of compositors, and the division of labour among them, almost precludes the presumption, that any of them have obtained any knowledge of the sense of what they are composing, and it has been held, that where a document has to be circulated among a great number of persons, the fact of the document being printed for this purpose only, does not amount to a publication of it. *Lawless v. Anglo-Egyptian, &c. Co.*, L. R., 4 Q. B. 262. See *post*, p. 870. As to publication by a telegraphic message or post card, see *Williamson v. Freer*, and *Sudgrove v. Hole*, *post*, p. 867. A libel may be published in a letter to a third person; but the publication of a libellous letter to the plaintiff alone, though it may be the subject of an indictment, is not a publication to support an action. *Phillips v. Jansen*, 2 Esp. 624. Where, however, the libel was contained in a letter sent by the defendant to the plaintiff, and opened by his clerk, and the defendant knew that the plaintiff's letters were usually opened by his clerk, this is evidence of a publication. *Delacroix v. Thevenot*, 2 Stark. 63; *Pullman v. Walter Hill & Co.*, *supra*. In *Fox v. Broderick*, 14 Ir. C. L. R. 453, the defendant by mistake misdirected a letter intended for the plaintiff, and containing the libel, so that it reached one K.: it was held that there was sufficient evidence of publication, and that it did not avail the defendant that he had no intention of giving the plaintiff a cause of action. So, where the libel was delivered to an agent of the plaintiff, sent by him to buy it. *Brunswick, Dk. of v. Harmer*, 14 Q. B. 185. Sending the libel in a letter addressed to the wife of the person libelled is a sufficient publication. *Wenman v. Ash*, 13 C. B. 836; 22 L. J., C. P. 190. But showing it by the defendant to his own wife is not publication. *Wennhak v. Morgan*, 20 Q. B. D. 635.

A letter containing a libel was proved to be in the handwriting of the

defendant; to have been addressed to a third party in Scotland; to have been received at an intermediate post-office, on the passage to Scotland, to be forwarded thither, and was produced at the trial with the proper postmarks, and the seal broken; this was held sufficient evidence of a publication to the person to whom it was addressed. *Warren v. Warren*, 1 C. M. & R. 250. Showing a copy of a libellous caricature to another, at his request, is said to have been held, not sufficient evidence of publication to support an action, though the decision has been doubted. *Smith v. Wood*, 3 Camp. 323. The delivery of a libellous pamphlet, by the governor of a colony, to his attorney-general, not for any official purpose is a publication. *Wyatt v. Gore*, Holt, N. P. 299. The sale of a libel in a defendant's shop, by his servant or agent there, for the defendant's benefit, is a publication by the defendant, though he was not privy to the contents or sale. Com. Dig. Libel (B. 1). So is the circulation, by the proprietor of a circulating library, of a book containing a libel. *Vizetelly v. Mudie's Select Library*, (1900) 2 Q. B. 170, C. A. But it is otherwise where the defendant's ignorance of its contents was not due to negligence on his part, and he did not know, and had no grounds for supposing that the publication was likely to contain libellous matter. *Emmens v. Pottle*, 16 Q. B. D. 354, C. A. The delivery of a newspaper to an officer at the stamp office, was a sufficient publication to sustain an indictment. *R. v. Amphlit*, 4 B. & C. 35. Proof, that the defendant accounted with the officer of stamps, for the duty on advertisements in the paper in question, was evidence of publication. *Cook v. Ward*, 6 Bing. 409. Evidence that the libel was written by the defendant's daughter, who was authorized to make out his bills and write his general letters of business, is not sufficient to charge the defendant; unless it can be shown that such libel was written with the knowledge, or by the procurement of the defendant. *Harding v. Greening*, 1 B. Moore, 477.

In order to show that the defendant had caused a libel to be inserted in a newspaper, a witness was called who proved that he had given a written statement to the editor, which had been communicated by the defendant for the purpose of such publication; and that the statement in the newspaper produced was exactly the same, with the exception of one or two slight alterations not affecting the sense; it was held that what the witness so published, might be considered as published by the defendant, but that the newspaper could not be read in evidence, without producing the written statement delivered by the witness to the editor. *Adams v. Kelly*, Ry. & M. 157. So, where a man makes a request to another to publish defamatory matter, of which for that purpose he gives him a statement, whether in full or in outline, and the agent publishes the language to some extent as his own, the man making the request is liable to an action as the publisher. *Parke v. Prescott*, L. R., 4 Ex. 169, Ex. Ch., per Smith, Keating, and Hannen, JJ., following S. C., and *R. v. Cooper*, 8 Q. B. 533, and allowing the exception to the ruling of Martin, B., at the trial. In this case Byles and Mellor, JJ., dissented from the judgment of the court, and followed the ruling of Martin, B., on the ground, that no evidence was given of any direction by the defendants, to publish the precise words set out in the declaration, or to publish any part of the libel, either as set out in the declaration, or as laid *in extenso* before the jury, and that therefore no amendment could cure the variance. In *Parke v. Prescott*, *supra*, the libel consisted in the publication by the local newspapers, of defamatory speeches spoken at a meeting of the board of guardians, where reporters for those newspapers were present. During the discussion the defendant E., who was present at the meeting, said, "He hoped the local press would take notice of this very scandalous case," and requested the defendant P., who was chairman, to give an outline of it; this P. did, and in the course of his

statement remarked, "I am glad gentlemen of the press are in the room, and I hope they will take notice of it." Upon which E. said, "And so do I"; P. also said, "He hoped publicity would be given to the matter." It was proved that the libel was a correct but a condensed report of what was said at the meeting and taken down by the reporters. This was held to be evidence of a publication of the libel by both E. and P. See *Parsons v. Sursey*, 4 F. & F. 247. A paper in the defendant's handwriting, found in the house of the editor of the newspaper, in which the libel appeared, is evidence against the defendant, though partially erased and altered (in immaterial parts) in the printed paper. *Turpley v. Blabey*, 2 N. C. 437. When a libel has been printed by the defendant's order, and he has taken away some of the impressions, one of those left by him, with the printer, may be read in evidence against him, without notice to produce the impressions he took away, as they are all equally originals. *R. v. Watson*, 2 Stark. 129. The sale of each copy of a printed libel is a distinct publication. *R. v. Carlile*, 1 Chitty, 451; *Brunswick, Dk. of v. Hurmer*, 14 Q. B. 185.

The publication of a libel may likewise be proved by the admission of the defendant. Where the defendant admitted that he was the author of a printed libel, "errors of the press and some small variance only excepted," Pratt, C.J., received this as evidence of publication, and put it to the defendant to prove material variances. *R. v. Hall*, Str. 416.

Proof of publication in newspapers.] Under stat. 6 & 7 W. 4, c. 76, s. 19, re-enacted by stat. 32 & 33 V. c. 24, s. 1, and sched. 2, discovery can for the purposes of this action be obtained by interrogatories "of the name of any person concerned as printer, publisher, or proprietor of any newspaper, or of any matters relative to the printing or publishing of any newspaper." *Fisher v. Owen*, 8 Ch. D. 645; *Allhusen v. Labouchere*, 3 Q. B. D. 654, C. A.; for the above section will prevent the defendant from objecting to answer, on the ground that the answer might criminate him.

The proprietorship of a newspaper may also be proved under the Newspaper Libel and Registration Act, 1881 (44 & 45 V. c. 60). Sect. 8 establishes a register of the proprietors of newspapers under the superintendence of the Registrar of Joint Stock Companies, or such person as the Board of Trade may authorize in that behalf; see sect. 1. By sect. 9, on or before July 31st in each year the printer and publishers of every newspaper are to make a return to the registry office (*i.e.*, the principal office of the registrar, see sect. 1), of the title of the newspaper, and the names of all the proprietors of such newspaper, together with their respective occupations, places of business, if any, and places of residence. Sect. 11 provides for a return showing any change of interest. By sect. 13, these returns the registrar is to register, in "the register of newspaper proprietors." By sect. 15, "Every copy of an entry in, or extract from, the register of newspaper proprietors, purporting to be certified by the registrar, or his deputy for the time being, or under the official seal of the registrar, shall be received as conclusive evidence of the contents of the said register of newspaper proprietors, so far as the same appear in such copy or extract, without proof of the signature thereto, or of the seal of office, affixed thereto, and every such certified copy or extract, shall in all proceedings, civil or criminal, be accepted as sufficient *prima facie* evidence of all the matters and things thereby appearing, unless and until the contrary thereof be shown." Sect. 7 authorizes the Board of Trade, when inconvenience would arise from the registry of all the names of proprietors, to authorize the registration in the name of some one or more responsible representative proprietors. By sect. 18, these provisions do not apply to the case of any newspaper belonging to a company incorporated under the Companies Acts, 1862 to 1879. By sect. 1, the "word 'newspaper' shall mean any

paper containing public news, intelligence, or occurrences, or any remarks, or observations therein, printed for sale, and published in England or Ireland periodically, or in parts or numbers at intervals not exceeding 26 days, between the publication of any two such papers, parts, or numbers, also any paper printed in order to be dispersed, and made public, weekly, or oftener, or at intervals not exceeding 26 days, containing only, or principally advertisements."

In the absence of a certificate of proprietorship of the defendant or of discovery or admission, it will be necessary to prove that the newspaper "was purchased of the defendant, or at any house, shop, or office belonging to or occupied by the defendant, or by his servants or workmen, or where he may usually carry on the business of printing or publishing such newspaper, or where the same may be usually sold." See 6 & 7 W. 4, c. 76, s. 8.

Proof of the speaking of the slander.] Though the plaintiff need not prove the speaking of all the words laid in the statement of claim, it is necessary to prove some material part of them, and it is not sufficient to prove merely equivalent words; *per* Lawrence, J., *Maitland v. Goldney*, 2 East, 434. There are many decisions as to the effect of variance in the slander stated in the pleadings and that proved, which have been rendered comparatively worthless by the statutory powers of amendment.

Words laid as spoken in English are not proved by evidence of words spoken in a foreign language. The original words must be stated, and then the meaning explained in English; *Zenobio v. Artell*, 6 T. R. 162; *Jenkins v. Phillips*, 9 C. & P. 766, *cor.* Coleridge, J.; but an amendment may be allowed, where the defendant would not be prejudiced. S. C. It must be averred in the claim that some person, in whose hearing the words were spoken, understood the foreign language: 1 Wms. Saund. 242, (1), cited by Williams, J., in *Amann v. Damm*, 8 C. B., N. S. 597, 600; 29 L. J., C. P. 313; and this allegation must be proved. Bac. Abr. Slander (D. 3).

Proof of innuendo.] The plaintiff must in general prove the innuendoes as laid, if traversed. It is the duty of the court to decide, whether or not a libel is capable of bearing the meaning assigned by the innuendo, and whether such meaning is actionable; leaving to the jury the question as to whether the words did, upon the particular occasion, bear the meaning assigned. *Blagg v. Sturt*, 10 Q. B. 899; *Id.* 906, Ex. Ch. See *Capital and Counties Bank v. Henty*, 7 Ap. Ca. 741, D. P. Where the words are not libellous, in their natural meaning, and the inference suggested by the innuendo is not such as reasonable people would draw, the plaintiff must prove, that, under the circumstances of publication, the inference is a reasonable one, and if he fail to do so, the judge must direct a verdict for the defendant. S. C. The facts from which the innuendo is to be inferred, must be known, both to the defendant, and to the persons to whom the writing is published. S. C. 5 C. P. D. 539, *per* Brett, L. J.

The court as well as the jury may notice the meaning of expressions which have passed into common use, however figuratively; and allusions to historical names and events, as a "frozen snake," will be taken to imply an imputation of treachery and ingratitude; and to act like "Judas," requires no explanation. *Hoare v. Silverlock*, 12 Q. B. 624, 633. In *Barnett v. Allen*, 3 H. & N. 376; 27 L. J., Ex. 412, the court were divided in opinion as to whether the word "blackleg" was actionable *per se*, and whether it could be explained by evidence. Words imputing that the plaintiff has brought a "blackmailing action" are actionable *per se*, *Marks v. Samuel*, (1904) 2 K. B. 287, C. A.

Where B. held bills accepted by the plaintiffs, and the defendant said "you must look out sharp that those bills are met by them," it was held that witnesses could not be asked what they understood by the words, until it

was proved that there was something to prevent those words from conveying the meaning which they ordinarily would convey. *Daines v. Hartley*, 3 Exch. 200; *Brunswick, Dk. of v. Horner*, 3 Car. & K. 10. The declarations of spectators, whilst viewing a libellous picture publicly exhibited, were admitted by Ld. Ellenborough, as evidence that the picture was intended to represent the parties libelled. *Du Bost v. Beresford*, 2 Camp. 512.

An imputation upon no named person, but on a class of persons (as owners of factories, &c.), may be applied by innuendo to a particular person, and it is for the jury to say whether the plaintiff was the person intended. *Le Fanu v. Malcomson*, 1 H. L. C. 637; *Turner v. Merryweather*, 7 C. B. 251.

It was formerly held that the whole of an innuendo, which was not, on the face of the declaration, a bad one, must be proved where it gave a specific character to the libel or slander. *Williams v. Stott*, 1 Cr. & M. 675. But, the power of amendment is sufficient to relieve the plaintiff from the restraint of his innuendo, where the ends of justice require it. Where there are several innuendoes, some of which are proved, and are sufficient to maintain the action, the plaintiff may confine his verdict to those which are proved. *Prudhomme v. Fraser*, 2 Ad. & E. 645.

[*Proof of malice.*] Where the publication is defamatory the law infers malice, unless the circumstances attending the publication rebut that inference; *per Le Blanc, J., R. v. Creery*, 1 M. & S. 282; and hence no evidence of malice beyond the defamation itself need be given. But, in certain cases, when the occasion is privileged (*vide post*, pp. 866 *et seq.*)—such as where the statement is made in giving the character of a servant, or confidential advice, or in the course of official proceedings, or by way of answer to pertinent questions from interested persons—a qualified bar is raised to the action, and malice in law is rebutted, rendering it then necessary to prove that there was malice *in fact* in making the statement; *Bromage v. Prosser*, 4 B. & C. 247, 256; *Taylor v. Hawkins*, 16 Q. B. 308; *Harrison v. Bush*, 5 E. & B. 344; 25 L. J., Q. B. 25; and that the defendant, by reason thereof, misused the privileged occasion. *Capital and Counties Bank v. Henty*, 5 C. P. D. 514, 542, *per Brett, L.J.* The onus of proving malice in fact is on the plaintiff. *Clark v. Molyneux*, 3 Q. B. D. 237, C. A.; *Jenoure v. Delmege*, (1891) A. C. 73, J. C. The mere fact of the language used on a privileged occasion being stronger than necessary, is not evidence of malice, *vide post*, pp. 870, 871.

In *Jackson v. Hopperton*, 16 C. B., N. S. 829, the defendant when applied to respecting the character of the plaintiff, who had been his saleswoman, charged her with dishonesty; the plaintiff proved that after quitting the defendant's service he accused her of theft, but said that if she would return, nothing should be said about it, and that afterwards, when she asked if he would give her a character, he refused unless she would admit that she had stolen his money; it was held, that there was evidence of express malice for the jury. In proving such express malice, evidence that the character given was false, is admissible; *Rogers v. Clifton*, 3 B. & P. 587; *King v. Waring*, 5 Esp. 13; *Pattison v. Jones*, 8 B. & C. 578; *Harrison v. Bush*, *supra*; or, that *part of* the imputation is false; *Blagg v. Sturt*, 10 Q. B. 899. Mere untruth, however, is not evidence of malice, unless coupled with proof that the defendant knew that what he published was untrue. *Fountain v. Boodle*, 3 Q. B. 5. Thus, where the words charged a governess with bad temper and ill manners, the plaintiff was allowed to give a general proof of good manners and temper, and the fact that no contrary evidence was given by the defendant, was held worthy of consideration by the jury, as tending to show that the defendant did not believe in the truth of the charge. S. C. So, the uttering *as of the defendant's own knowledge* of serious charges, proved to be untrue, affords evidence of express malice. *Perry v. East*, Sitt. in West.;

Feb. 5th, 1873, *cor. Brett, J., ex relut. amici*. So where the defendant, from some indirect motive such as anger or prejudice with regard to a particular subject-matter, reckless whether what he states is true or false, utters such charges. *R. Aquarium, &c. Soc. v. Parkinson*, (1892) 1 Q. B. 431, C. A. On a charge of want of skill in particular work done by the defendant for the plaintiff, the plaintiff cannot prove his general skill and competency, in order to show malice. *Brine v. Bazalgette*, 3 Exch. 692. And if the defendant made the defamatory statements, believing them to be true, it is immaterial that he had no reasonable grounds for that belief. *Clark v. Molyneux*, *ante*, p. 859. Where the defendant had pleaded only the general issue, but the plaintiff proposed nevertheless to give proof of the falsehood of the charge, *Ld. Ellenborough* said that if he did so, it would allow the defendant to give evidence of its truth. *Brown v. Croome*, 2 Stark. 297. See further, as to evidence of truth to rebut evidence of falsehood, *post*, p. 876. Express malice need not always be proved by extrinsic evidence, but may be collected from the libel itself by the jury. *Wright v. Woodgate*, 2 C. M. & R. 573. A defence of justification, abandoned at the trial, is not available as evidence of express malice so as to negative the defence of a privileged communication. *Wilson v. Robinson*, 7 Q. B. 68. But, where such a defence is neither proved nor abandoned, nor its substance retracted at the trial, though plaintiff offers to accept nominal damages, if retracted, this is legitimate evidence of malice. *Simpson v. Robinson*, 12 Q. B. 511. So, the plaintiff may show that he and the defendant were on ill terms, as that he had occasion to impute fraud to the defendant before the words were spoken; and he may prove this by evidence of an examination of the plaintiff, in the defendant's presence, in the Insolvent Debtors' Court, *since* the words spoken, on which occasion the defendant, though called upon, did not contradict the statement. S. C. See *Melen v. Andrews*, M. & M. 336.

A corporation is liable for a malicious libel published by its servant acting in the course of his employment although "he had no actual authority express or implied, to write libels, nor to do anything legally wrong." *Citizen's Life Assur. Co. v. Brown*, (1904) A. C. 423, 427, J. C.

Evidence of other words or libels.] In an action for libel or slander evidence of other libels or words, is sometimes given to show the malevolence of the defendant. Thus it may be proved that the defendant spoke the same words at different times. *Charlter v. Barret*, Peake, 22; *Cumfield v. Bird*, 3 Car. & K. 56. Publications going back more than six years before the libel complained of, were allowed to be given in evidence. *Barret v. Long*, 3 H. L. C. 395. So, words spoken *after* those for which the action is brought, whether actionable or not, are admissible to show *quo animo*, the words which were the subject of the action were spoken; *Rustell v. Macquister*, 1 Camp. 48, n.; *Tate v. Humphrey*, 2 Camp. 73, n.; *Lee v. Huson*, Peake, 166; and to show express malice, when the words sued on formed a privileged communication; *Hemmings v. Gasson*, E. B. & E. 346; 27 L. J., Q. B. 252: but, if the words were spoken long after those sued on, the attention of the jury should be directed to that fact, and that the words might have been applied to something else. *Id.* So, evidence of previous slander may be given to show malice, though damages have already been recovered in respect of it. *Symons v. Blake*, 1 M. & Rob. 477. So, in an action against the editor of a periodical work, articles published from time to time alluding to the action and attacking the plaintiff, are admissible to show *quo animo* the libel was published and that it was published concerning the plaintiff. *Chubb v. Westley*, 6 C. & P. 436; see *Mead v. Daubigny*, Peake, 125. Evidence of subsequent words of the same import with the alleged slander has been refused, when the words declared on were sufficient to show

the intention of the defendant. *Pearce v. Ormsby*, 1 M. & Rob. 455; *Stuart v. Lovell*, 2 Stark. 93; *Defries v. Davis*, 7 C. & P. 112. In an action for a libel published in a weekly paper, evidence was admitted that other papers of the same title had been since purchased at the defendant's shop, to show that the papers which purported to be weekly publications of public transactions, were sold deliberately in the regular course of public circulation, but *Ld. Ellenborough* added that he should direct the jury not to take it into consideration in damages. *Plunkett v. Cobbett*, 5 Esp. 136; *Barrell v. Adkins*, 1 M. & Gr. 807. And the rule appears now to be that where there is no pretence of privilege nor ambiguity in the libel, evidence is admissible on either side to prove or disprove actual malice, and for that purpose repetitions of the same imputation, either before or since the libel complained of, may be shown; and if they establish another cause of action, the jury should be cautioned not to give damages in respect of it. *Pearson v. Lemaître*, 5 M. & Gr. 700. This caution is one which a jury might find it difficult to act upon. It seems that it is not always necessary for the judge to give this caution. *Darby v. Ouseley*, 1 H. & N. 1; 25 L. J., Ex. 227. Evidence of other libels, is not generally admissible, unless they relate to the libel set out in the statement of claim. *Finnerty v. Tipper*, 2 Camp. 72.

Where other words besides those inserted in the statement of claim are thus given in evidence, the defendant may prove such words to be true, because he has had no opportunity of justifying them. *Warne v. Chadwell*, 2 Stark. 457. But, not where the words amount to a mere repetition of the slander alleged in the claim. *Per Park, J.*, in *Higgs v. Snell*, Exeter Sp. Ass. 1827.

Evidence of plaintiff's good character.] The plaintiff could not go into general evidence of his good character, either where the general issue alone was pleaded, or where there were pleas of justification on the record, unless the issue involved the question of general character. See *ante*, pp. 86, 87.

Proof of damage.] Where the words are actionable in themselves or with reference to the plaintiff's trade, it is not necessary to give any evidence of damage. *Tripp v. Thomas*, 3 B. & C. 427; *Ingram v. Lawson*, 6 N. C. 112. Words are not actionable, though special damage has ensued, unless they are defamatory or injurious in their nature; *Kelly v. Partington*, 5 B. & Ad. 645; even though such damage would under some circumstances and at the hands of some persons, probably arise from the speaking of the words. *Miller v. Davil*, L. R., 9 C. P. 118, 124.

The plaintiff will not be allowed under a general allegation of damage, to give in evidence particular instances. B. N. P. 7; 1 Wms. Saund. 243 *d.*, (5). Generally the names of persons, who have ceased to deal with the plaintiff in consequence of the libel, must be mentioned in the statement of claim. But where the names of such persons are not within the plaintiff's knowledge, the allegation may be general: thus, where the declaration, in an action for slander imputing incontinence to the plaintiff, stated that he was a preacher to a dissenting congregation in a certain chapel, and derived considerable profit from his preaching, and that by reason of the slander, "the said persons frequenting his chapel," had refused to permit him to preach there, and had discontinued his salary, &c., it was held sufficient without saying who those persons were. *Hurtley v. Herring*, 8 T. R. 130. But there must be some evidence that the diminished attendance was owing to the slander, and that the plaintiff suffered by it. *Hopwood v. Thorn*, 8 C. B. 293. In an action for slander, for words spoken of the plaintiff, in his trade or in his business, with a general allegation of loss of business, it is competent to the plaintiff to prove, and the jury to assess damages for a general loss or decrease

of trade, without showing who are the particular customers he has lost. *Evans v. Harries*, 1 H. & N. 251; 26 L. J., Ex. 31; see *Riding v. Smith*, 1 Ex. D. 91, cited *post*, p. 880. Where the declaration stated that in consequence of the libel, the plaintiff lost the profits of certain performances at the theatre, it was held that a witness might be asked "whether the receipts of the house had not diminished," but "not whether particular persons had not in consequence given up their boxes." *Ashley v. Harrison*, 1 Esp. 48. The persons specified in the statement of claim as having left off dealing, &c., are the proper witnesses to prove the fact: 1 Wms. Saund. 243 g. (5); and it cannot be proved from their declarations. *Tilk v. Parsons*, 2 C. & P. 201; and see 1 Esp. 50.

It may be pleaded and proved that when the defendant A. wrote the libel to B. he knew that B. would publish and circulate it, for A. is then liable for the consequences of such repetition. *Whitney v. Moignard*, 24 Q. B. D. 630. But an allegation that, by reason of the speaking of slanderous words by the defendant, one D. refused to trust the plaintiff, is not proved by evidence that the defendant spoke the words to E., who voluntarily, and without the privity of the defendant, repeated them to D. *Ward v. Weeks*, 7 Bing. 211; *Tunncliffe v. Moss*, 3 Car. & K. 83. *Parkins v. Scott*, 1 H. & C. 153; 31 L. J., Ex. 331, was an action brought by husband and wife; the slander proved imputed adultery to the wife, the husband declared that he left his wife in consequence of the charge after she had informed him of it; it was held that the action was not maintainable, as there was no obligation upon the wife to repeat what she had heard. *Lynch v. Knight*, *infra*, and *Speight v. Gosney*, 60 L. J., Q. B. D. 231, C. A., are to the same effect. But, where there is moral obligation to repeat the slander, then such repetition is privileged, and the original speaker is liable for the resulting damage. *Derry v. Handley*, 16 L. T. 263, E. T. 1867, Q. B. It was laid down by Ld. Ellenborough that the special damage must be the legal and natural consequence of the words spoken, and not the mere wrongful act of a third person. *Vicars v. Wilcocks*, 8 East, 1; *Ward v. Weeks*, 7 Bing. 216; *Haddan v. Lott*, 15 C. B. 411; 24 L. J., C. P. 49. But the correctness of this proposition has been doubted. *Green v. Button*, 2 C. M. & R., 713, 715; *Lynch v. Knight*, 9 H. L. C. 577, 590, 600. And it seems at variance with *Newman v. Zachary*, Aleyn, 3, where it was held that if a stranger wrongfully disturbs the plaintiff's possession, in consequence of the defendant's slander, an action lies against the defendant, though the stranger may also be sued. And see *Lumley v. Gye*, 2 E. & B. 116, 239; 22 L. J., Q. B. 463, 474. Where, in consequence of defamatory words spoken by the defendant, the person to whom they were spoken turns the plaintiff out of his service, the defendant is liable, though the words were not believed to be true by the person to whom they were spoken. *Knight v. Gibbs*, 1 Ad. & E. 43. See notes to *Vicars v. Wilcocks*, 2 Smith's L. C.

The damage must be a natural and reasonable consequence of the slander. *Lynch v. Knight*, *supra*; *Chamberlain v. Boyd*, 11 Q. B. D. 407, C. A. Thus, where the defendant libelled a public performer, in consequence of which she refused to sing, and the party who had engaged her to sing brought an action, Ld. Kenyon was of opinion that the injury was too remote. *Ashley v. Harrison*, 1 Esp. 48. So where the defendant told the employers of the plaintiff, S., that S. had left a house owing its rent, in consequence of which they dismissed S. *Speake v. Hughes*, (1901) 1 K. B. 138, C. A. Illness alleged to have been caused to the plaintiff by reason of the words spoken is too remote. *Allsop v. Allsop*, 5 H. & N. 534; 29 L. J., Ex. 315. The loss of the substantial benefit arising from the hospitality of friends is sufficient special damage. *Darves v. Solomon*, L. R., 7 Q. B. 112. But mere loss of *consortium vicinorum* is not sufficient. Com. Dig. Action

on the Case for Defamation (D. 30); *Allsop v. Allsop*, *ante*, p. 862; nor the loss of the chance of being elected by ballot, to a club called the "Reform Club." *Cumberlain v. Boyd*, *ante*, p. 862. It is unsettled whether the loss by a wife, of her husband's consortium, is sufficient damage. *Lynch v. Knight*, *ante*, p. 862. Before stat. 54 & 55 V. c. 51, *ante*, p. 851, words charging a woman with adultery, whereby she was not allowed to continue a member of a society of Protestant dissenters, or to become a member of similar societies in the same sect, were not actionable, as the damage was not of a temporal nature. *Roberts v. Roberts*, 5 B. & S. 384; 33 L. J., Q. B. 249.

In the case of words actionable by reason of special damage only the damages should be confined to the actual pecuniary loss alleged and proved. *Dixon v. Smith*, 5 H. & N. 450; 29 L. J., Ex. 125. This rule is, however, frequently neglected in practice, and general damages are given when *any* damage has been proved. See Odger on Libel & Slander, 2nd ed. 302. Thus in *Knott v. Jeffery*, Times, June 2nd, 1883, *cor.* Field, J., where the only damage proved was that the plaintiff was not invited to dinner by a witness, who would have invited her but for the slander, a verdict was given and retained for 400*l.*

Where the libel consists of an incorrect statement of a conviction of the plaintiff by a magistrate, the plaintiff may, with a view to the assessment of damages, enter into all the circumstances which led to the conviction, although such evidence tends to show that the conviction was erroneous. *Gwynn v. S. E. Ry. Co.*, 18 L. T. 738, *cor.* Cockburn, C.J.

Where the libel consists of comments in a newspaper on a criminal trial in which the plaintiff was acquitted, a course of cross-examination of him by the defendant's counsel, tending to show that he has been guilty of the crime for which he was acquitted, will seriously aggravate the libel. *Risk Allah Bey v. Whitehurst*, *Id.* 615, *cor.* *Id.*

"The jury in assessing damages are entitled to look at the whole conduct of the defendant, from the time the libel was published, down to the time they give their verdict." *Prued v. Graham*, 24 Q. B. D. 53, 55, C. A.

Where two or more persons, not jointly interested, bring as co-plaintiffs an action for libel under Rules, 1883, O. xvi., r. 1, *ante*, p. 89, the damages should, it seems, be separately assessed. *Booth v. Briscoe*, 2 Q. B. D. 496, C. A. But where an action is brought against the author, publisher, and printer of a libel jointly, if the jury find them all guilty there must be damages against all jointly. *Dawson v. McClelland*, (1899) 2 I. R. 486, C. A.

Injunction.] An injunction may be granted to restrain a defendant, from publishing libellous statements of the plaintiff to the injury of his trade. *Thorley's Cattle Food Co. v. Massam*, 14 Ch. D. 763, C. A.; *Hayward v. Hayward*, 34 Ch. D. 198. See also *Quartz Hill, &c. Mining Co. v. Beall*, 20 Ch. D. 501, C. A.; *Liverpool Household Stores Assoc. v. Smith*, 37 Ch. D. 170, C. A. So, to restrain the utterance of slanderous statements, of the plaintiff, to the like effect. *Loog v. Bean*, 26 Ch. D. 306, C. A. And in such cases it is not necessary to prove actual damage, if the libel be calculated to injure the plaintiff's trade. *Thomas v. Williams*, 14 Ch. D. 864. An injunction may now be granted to restrain a libel other than a trade libel; see 20 Ch. D. 511, *per* Lindley, L.J.; and also to restrain the further utterance of slanders of the plaintiff; *Clarke v. Main*, Times, March 24th, 1904, *cor.* *Id.* Alverstone, C.J., in which case the defendant had made charges of gross immorality against a female plaintiff to different persons on different occasions. See further *Bonnard v. Perryman*, (1891) 2 Ch. 269, C. A.; *Monson v. Tussands*, (1894) 1 Q. B. 671, C. A.

Costs.] As to the plaintiff's right to costs, *vide ante*, pp. 296, 301. The

County Court has no original jurisdiction in an action for any libel or slander; 51 & 52 V. c. 43, s. 56. In an action brought under 54 & 55 V. c. 51, *ante*, p. 851, by a woman for words imputing unchastity, without special damage, she (sect. 1) "shall not recover more costs than damages unless the judge shall certify that there was reasonable ground for bringing the action."

Consolidated actions.] By the Law of Libel Amendment Act, 1888, 51 & 52 V. c. 64, s. 5, a judge or the court, upon an application by or on behalf of two or more defendants in actions in respect to the same, or substantially the same, libel brought by one and the same person, may make an order for the consolidation of such actions, so that they shall be tried together; and "in a consolidated action under this section the jury shall assess the whole amount of the damages (if any) in one sum, but a separate verdict shall be taken for or against each defendant in the same way as if the actions consolidated had been tried separately; and if the jury shall have found a verdict against the defendant or defendants in more than one of the actions so consolidated, they shall proceed to apportion the amount of damages which they shall have so found between and against the said last-mentioned defendants; and the judge at the trial, if he awards to the plaintiff the costs of the action, shall thereupon make such order as he shall deem just for the apportionment of such costs between and against such defendants."

Defence.

All defences which raise new matter, or would be likely to take the plaintiff by surprise, must be pleaded specially. Rules, 1883, O. xix., rr. 15, 17, *ante*, p. 309. Thus, denial of the publication of the libel, or of its being published in a defamatory sense, or in the sense laid in the innuendo, or of its being published maliciously, must be now raised by special defence: so the defence that it is a privileged communication, must be pleaded specially. So, in the case of slander, where the words are spoken of the plaintiff in his profession, &c.; a denial that he carried on the profession, &c., must be pleaded specially.

In action for words, *prima facie* imputing a criminal offence (*vide ante*, p. 851), against the plaintiff, the defendant may contend that they were not so meant. Where the plaintiff brought an action against the defendant for saying he had heard that the plaintiff was hanged for stealing a horse, but it appeared upon the evidence that the words were spoken in grief and sorrow for the news, the plaintiff was non-suited, there being no proof of malice. *Anon.*, *coram*, Hobart, J., cited 1 Lev. 82. But it seems to be no defence that the words were spoken carelessly or in jest. Hawk. P. C. 8th ed., p. 546.

The defendant, in an action for a libel, is entitled to have the whole publication read from which the libellous passages are extracted. *Cooke v. Hughes*, Ry. & M. 112; *Mullett v. Hulton*, 4 Esp. 248. But where a libel is unambiguous in itself and does not refer to any other writing, the defendant cannot use any other writing for the purpose of explaining its meaning. *Leyman v. Latimer*, 3 Ex. D. 15; 352, C. A.

By Rules, 1883, O. xxii., r. 1, *ante*, p. 74, money cannot be paid into court in this action, together with a defence denying liability.

Privileged communication.] The defence that the words were written or spoken on a privileged occasion must now be pleaded specially. The privilege is either an absolute, or a qualified bar to the action.

Privileged communication—Absolute privilege.] There are certain occasions absolutely privileged, on which the publication of defamatory matter, even though false and malicious, affords no ground of action; this is on the ground of public policy; *per Cur. Dawkins v. Rokeby, Ltd.*, L. R., 8 Q. B. 255, 268, Ex. Ch.; L. R., 7 H. L. 744. In the cases falling under this head, no question of intention, in speaking or writing the words, can arise. Thus, no action lies against one officer of state in respect of a communication to another, relating to state matters in the course of his official duty. *Chatterton v. India, Sec. of State for*, (1895) 2 Q. B. 189, C. A. Nor against a member of parliament for words spoken in his place. *R. v. Abingdon, Ltd.*, 1 Esp. 228, *per* Ld. Kenyon, C.J.; and see *Darison v. Duncun*, 7 E. & B. 229, 233, 26 L. J., Q. B. 104, 107, *per* Ld. Campbell, C.J. See also *Bradlaugh v. Gossett*, 12 Q. B. D. 271. So, no action lies for a libel contained in a petition to parliament. *Lake v. King*, 1 Wms. Saund. 131 b.

There is absolute privilege where the words are spoken in the course of a legal proceeding. Thus, words used by a judge of a court of record, in his judicial capacity, are not actionable, although they were irrelevant to the matter before him, and were uttered maliciously, and not *bonâ fide*; *Scott v. Stansfield*, L. R., 3 Ex. 220. So it would seem in the case of the judge of a consular court, having plenary jurisdiction over British subjects. *Haggard v. Pelicier Frères*, (1892) A. C. 61, J. C., *post*, p. 919. So, no action lies for observations made, without reasonable and probable cause and maliciously, by a magistrate in the course of his judicial duties, even in giving leave for the withdrawal of a summons obtained on information. *Law v. Llewellyn*, (1906) 1 K. B. 487, C. A. So no action lies for words addressed by a coroner in the course of his duty to a jury empanelled before him; *Thomas v. Churton*, 2 B. & S. 475; 31 L. J., Q. B. 139; nor, for words spoken by the president of a court-martial; *Jekyll v. Moore*, 2 N. R. 341; nor, for words used either by the party; *Ram v. Lamley*, Hutt. 113; *Weston v. Dobinet*, Cro. Jac. 432; *Astley v. Younge*, 2 Burr. 807; *Johnson v. Evans*, 3 Esp. 32; or, by a witness; *Brode's case*, cited Palmer, 144; *Harding v. Bulman*, 1 Brownl. 2; *Scaman v. Netherclift*, 1 C. P. D. 540; 2 C. P. D. 53, C. A., in the course of legal proceeding. The privilege extends to a witness as regards his statements made to the client and solicitor in preparing his proof for the trial. *Watson v. McEwan*, (1905) A. C. 480, D. P. Proceedings under the Lunacy Act, 1890, to obtain from a magistrate an order for the reception and detention of a lunatic, are within this rule. *Hodson v. Pare*, (1899) 1 Q. B. 455, C. A. No action will lie for words in an affidavit made in the course of a legal proceeding, although untrue to the deponent's knowledge, and introduced maliciously; *Revis v. Smith*, 18 C. B. 126; 25 L. J., C. P. 195; *Henderson v. Broomhead*, 4 H. & N. 569; 28 L. J., Ex. 360, Ex. Ch.; nor, for words spoken by a witness, in giving evidence, before a select committee of the House of Commons. *Goffin v. Donnelly*, 6 Q. B. D. 307; nor, it would seem, for oral or written statements made by an officer summoned to give evidence before a court of inquiry, instituted under the articles of war. *Dawkins v. Rokeby, Ltd.*, *supra*. So, where it was the duty of the defendant, an officer, to present to the proper military authorities reports concerning other officers, and he accordingly presented one concerning the plaintiff which was libellous: it was held that the plaintiff could maintain no action, though the report was published by the defendant maliciously, and without probable cause, and not in the *bonâ fide* discharge of his duty. *Dawkins v. Paulet*, L. R., 5 Q. B. 94, *dis.* Cockburn, C.J. So a commission issued by the bishop of a diocese under 1 & 2 V. c. 106, s. 77, and 48 & 49 V. c. 54, s. 3, to inquire into the inadequate performance of the ecclesiastical duties of a benefice, creates a judicial tribunal, and no action lies for words spoken by a witness in giving evidence before it. *Burratt v. Kearns*, (1905)

1 K. B. 504, C. A.; even although the evidence was not given on oath as required by sect. 7. S. C.

No action lies for words spoken by counsel in a court of justice with reference to, and in the course of, a judicial inquiry going on, and in which he is engaged, although the words are irrelevant to the questions in issue, and are uttered maliciously. *Wood v. Gunston*, Styles, 462; *R. v. Skinner*, Lofft, 55, 56; *Munster v. Lamb*, 11 Q. B. D. 588, C. A. A solicitor acting as advocate has the same privilege as a counsel. S. C.; *Mackay v. Ford*, 5 H. & N. 792; 29 L. J., Ex. 404.

There is no absolute privilege to the members of a county council, at a meeting of the council for hearing applications for music and dancing licences under 25 G. 2, c. 36, the duties being administrative and not judicial. *R. Aquarium, &c. Soc. v. Parkinson*, (1892) 1 Q. B. 431, C. A. The same principle applies to an ordinary meeting of the council. S. C.

As to the reports of legal proceedings in newspapers, it is now provided by the Law of Libel Amendment Act, 1888, 51 & 52 V. c. 64, s. 3, that "a fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged: Provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter." By sect. 1, the word "newspaper" has the same meaning as in the stat. 44 & 45 V. c. 60, s. 1, *ante*, pp. 857, 858.

A letter to the Privy Council defaming the plaintiff, a public officer removable by them, is not absolutely privileged. *Proctor v. Webster*, 16 Q. B. D. 112, C. A.

Privileged communication—Qualified privilege—Evidence to rebut malice. It more frequently happens that the occasion only affords a qualified bar to the action, the bar being dependent on the real motive and intention of the speaker or writer. In these cases only the *prima facie* inference of malice is rebutted, and it becomes necessary for the plaintiff to prove malice in fact. *Bromage v. Prosser*, 4 B. & C. 247, 256; *Taylor v. Hawkins*, 16 Q. B. 308; *Harrison v. Bush*, 5 E. & B. 344; 25 L. J., Q. B. 25. *Vide ante*, p. 859. A communication made *bonâ fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter, which, without this privilege, would be slanderous and actionable. *Harrison v. Bush*, *supra*. See *Toogood v. Spyring*, 1 C. M. & R. 181, 193, *per* Parke, B.; *Somerville v. Hawkins*, 10 C. B. 583; 20 L. J., C. P. 131; *Cowles v. Potts*, 34 L. J., Q. B. 247, cited *post*, p. 870; and *Henwood v. Harrison*, L. R., 7 C. P. 606. The word "duty" includes "moral and social duties of imperfect obligation"; *Harrison v. Bush*, *supra*; and, "where a person is so situated, that it becomes right, in the interests of society, that he should tell a third person," then the occasion is privileged. *Davies v. Sneed*, L. R., 5 Q. B. 608, 611, *per* Blackburn, J.; *accord. Waller v. Lock*, 7 Q. B. D. 619, C. A.; *Stuart v. Bell*, (1891) 5 Q. B. 341, C. A. It is not, however, sufficient that the person giving the information, should *bonâ fide* think that he is discharging a moral or social duty; *Id.* 349, 356, *per* Lindley and Lopes, L.J.J., dissenting from *dictum* of Jessel, M.R., in *Waller v. Lock*, *supra*, at p. 621; or that he should think that the person to whom he makes the communication has a corresponding interest or duty. *Hebditch v. MacIlwaine*, (1894) 2 Q. B. 54, C. A. So, if he *bonâ fide* address a wrong person, who has no such duty or interest, he is liable. S. C., overruling *Tompson v. Dashiwood*, 11 Q. B. D. 43. There is no privilege as between H., the writer of a libel on P., and the clerks whom H. ordinarily employed to copy his letters; *Pullman v. Hill*, (1891) 1 Q. B. 524; nor, as

between H. and P.'s clerks, who usually read P.'s letters. S. C. It is, however, otherwise where H. has acted in the reasonable and ordinary course of business as to his letters. See *Boxsius v. Goblet*, and *Edmondson v. Birch & Co.*, *post*, p. 870. Libellous matter which would have been privileged if sent in a sealed letter, is not privileged if sent unnecessarily by a post telegram. *Williamson v. Freer*, L. R., 9 C. P. 393. *Secus*, if the telegram did not disclose the plaintiff's name, or indicate that it referred to him, and there is no proof that the statements therein made were understood by any person through whose hands it passed, to refer to the plaintiff, except the person to whom it was sent. See *Sadgrove v. Hole*, (1901) 2 K. B. 1, C. A., where the alleged libel was on a post card.

When the defendant insists that the publication is privileged, it is for the judge to say whether the occasion creates the privilege. If the occasion creates such privilege, but there is evidence of express malice, either from extrinsic circumstances, or from the language of the libel itself, the question of express malice should be left to the jury. *Cooke v. Wildes*, 5 E. & B. 328; 24 L. J., Q. B. 367; *Gilpin v. Fowler*, 9 Exch. 615; 23 L. J., Ex. 153, Ex. Ch.; *Wright v. Woodgate*, 2 C. M. & R. 573; *Spill v. Maule*, L. R., 4 Ex. 232, 237; *Stace v. Griffith*, L. R., 2 P. C. 420. As to what amounts to proof of malice, *vide ante*, pp. 859 *et seq.*

If there be no evidence of express malice, the judge is bound to direct a verdict for the defendant. *Somerville v. Hawkins*, and *Henwood v. Harrison*; *ante*, p. 866, *Cooke v. Wildes*, *supra*; *Caulfield v. Whitworth*, 18 L. T. 527, T. T. 1868, C. P.; *Lawless v. Anglo-Egyptian, &c. Co.*, L. R., 4 Q. B. 262. So, if words used in a privileged communication, taken in connection with admitted facts, are such as might have been used honestly and *bonâ fide* by the defendant, the judge may direct a verdict for the defendant. *Spill v. Maule*, L. R., 4 Ex. 232, Ex. Ch. When words, imputing misconduct of which A. and B. are alleged to have been jointly guilty, are spoken to A. on an occasion which is privileged as to him, the occasion is privileged as to B. also. *Davies v. Sneed*, L. R., 4 Q. B. 608.

The following are instances of privileged statements, in which the *primâ facie* inference of malice is rebutted:—

"A member of Parliament, who publishes an amended version of his speech, is liable for that, although he might have spoken the same words in his place with impunity; but if a member were to repeat *bonâ fide* to his constituents what he said in the house, for the purpose of explaining his conduct to them, I think he would be protected." *Davison v. Duncan*, 26 L. J., Q. B. 104, 107; 7 E. & B. 229, 233, *per* Campbell, C.J. See *Wason v. Walter*, L. R., 4 Q. B. 73.

As to privilege in the case of an advocate, *vide ante*, p. 866.

Words spoken *bonâ fide*, for the purpose of obtaining redress, or of forwarding the ends of justice, though not spoken in the course of a legal proceeding, are privileged. *Lake v. King*, 1 Wms. Saund. 131 b; *R. v. Baillie*, 21 How. St. Tr. 10; *Fairman v. Ives*, 5 B. & A. 642. Where the libel complained of is a representation made *bonâ fide* to a public officer (as the postmaster-general) by the defendant, respecting the conduct of a person under him, it is not actionable. *Blake v. Pilfold*, 1 M. & Rob. 198; *Woodward v. Lander*, 6 C. & P. 548; *Stace v. Griffith*, L. R., 2 P. C. 420. In *Beatson v. Skene*, 5 H. & N. 838; 29 L. J. Ex. 430, the defendant was the civil commissioner, attached to a corps formerly commanded by the plaintiff; the officer succeeding the plaintiff was directed to inquire into, and report upon the condition of the corps, and was referred to the defendant for information; he accordingly made inquiries of the defendant; it was held that the defendant's reply was privileged. See also *Dawkins v. Paulet*, *ante*, p. 865. A memorial addressed to the secretary of state for the removal of the plaintiff from the commission of the peace

was held to be privileged. *Harrison v. Bush*, 5 E. & B. 344; 25 L. J., Q. B. 25. Words spoken by a member of a county council at a meeting of that body for granting music and dancing licenses under 25 G. 2, c. 36, are privileged. *R. Aquarium Socy. v. Parkinson*, (1892) 1 Q. B. 431, C. A., and the principle seems to apply to its other meetings. Where the defendant attacked the character of a Roman Catholic priest, by attributing to him improper conduct as a priest, it was held to be no excuse that the libel was published at a meeting, to petition parliament against making a grant to a Roman Catholic college. *Hearne v. Stowell*, 12 Ad. & E. 719. See *Dickeson v. Hilliard*, L. R., 9 Ex. 79.

Where the words are spoken in confidence, by way of advice or otherwise, they are privileged. Thus, where the party is applied to for the character of a servant, and in giving it makes use of defamatory words, they are not actionable. *Edmondson v. Stevenson*, B. N. P. 8; *Weatherston v. Hawkins*, 1 T. R. 110. But, if the supposed libel be not communicated *bonâ fide*, it does not fall within the protection of privileged communications. *Per Bayley, J., Pattison v. Jones*, 8 B. & C. 584; *Kelly v. Partington*, 5 B. & Ad. 645. Whether the master made the communication voluntarily or not, is a circumstance which the jury are to consider, in forming an opinion on the *bona fides*. "I do not mean to intimate," says *Ld. Alvanley, C.J.*, in *Rogers v. Clifton*, 3 B. & P. 592, "that if a servant were strongly suspected of having committed a felony while in his master's service, that master is not at liberty to warn others from taking him into their service; for it is the duty of every person to guard the public against admitting such servants into their houses." "A master," says *Bayley, J.*, in *Pattison v. Jones*, 8 B. & C. 584, "may, when he thinks that another is about to take into his service one whom he knows ought not to be taken, set himself in motion and do some act to induce that other to seek information from, and put questions to him. The answers to such questions given *bonâ fide*, with the intention of communicating such facts as the other party ought to know, will, although they contain slanderous matter, come within the scope of a privileged communication. But in such a case it will be a question for the jury whether the defendant has acted *bonâ fide*, intending honestly to discharge a duty, or whether he has acted maliciously, intending to do an injury to the servant." See also *Child v. Afleck*, 9 B. & C. 403. When a person, *after* he has given a good character, discovers something to the prejudice of the servant, unknown to him at the time he gave the character, he may and ought to disclose it to the party who engaged the servant, on the faith of the character so given, and he may make the communication voluntarily, and the whole is privileged. *Gardner v. Stade*, 13 Q. B. 796.

Defamatory words spoken by way of confidential advice to persons who ask it, or have a right to expect it, are privileged. Thus in an action for saying of a tradesman, "he will be a bankrupt soon," it appeared that the words were not spoken maliciously, but in confidence and friendship, and by way of warning. *Pratt, C.J.*, directed the jury to find the defendant not guilty. *Hewer v. Dowson*, B. N. P. 8; *McDougall v. Claridge*, 1 Camp. 267; *Dunman v. Bigg*, *Id.* 269, n. The defendant, the tenant of a farm, required some repairs to be done at the farmhouse, and B., the agent of the landlord, directed the plaintiff to do them; the plaintiff did them, but in a negligent manner, and while they were proceeding got drunk; and circumstances occurred which induced the defendant to believe that the plaintiff had broken open his cellar door and got drunk, and spoiled the work; and the defendant told D., a stranger, in the presence of the plaintiff, and afterwards repeated to D., in the absence of the plaintiff, that the plaintiff had broken open the door; on the same day he made the same

complaint to B.: it was held that the complaint to B. was a privileged communication if made *bonâ fide*, and without any malicious intention; that the statement made to the plaintiff, in the presence of D., was also privileged, if done honestly and *bonâ fide*; that the circumstance of its being made in the presence of a third person did not of itself make it unauthorized; and that it was a question for the jury to determine, from the circumstances, whether the defendant acted *bonâ fide*, or was influenced by malicious motives: but that the statement to D., in the absence of the plaintiff, was unauthorized and officious, and therefore not protected, though made in the belief of its truth, if it were false in fact. *Toogood v. Spyring*, 1 C. M. & R. 181; see also *Brooks v. Blanshard*, 1 Cr. & M. 779; *Bennett v. Deacon*, 2 C. B. 628. The defendant having given notice of dismissal to his footman and cook, they separately went to him and asked him his reasons for discharging them, when he told each (in the absence of the other) that he or she was discharged because both had been robbing him; it was held a privileged communication. *Manby v. Witt*, 18 C. B. 244; 25 L. J., C. P. 294. See also *Davies v. Sneed*, L. R., 5 Q. B. 608, cited *ante*, p. 867. If a person about to dismiss his servant for dishonesty calls in a friend to hear what passes, the presence of such third person does not take away the privilege from words which the master then uses imputing the dishonesty. *Taylor v. Hawkins*, 16 Q. B. 308. A charge of theft made against the plaintiff, in the presence of a stranger is privileged, if the defendant believed it to be true and acted *bonâ fide*, and did not make it before more persons, or in stronger language than necessary; and it is for the jury, not for the judge, to say whether the facts bring the case within the privilege. *Padmore v. Lawrence*, 11 Ad. & E. 380. The plaintiff, a clerk, called at the defendant's shop for two boxes, and was desired to fetch them from an inner room; a box of some value was missed from this room, upon which the defendant went to the plaintiff's employers and said, in the presence of a witness, "there was no one else in the room, and he (the plaintiff) must have taken it;" it was held that the communication was privileged, being made for the purpose of protecting the interest of the person, by whom, or to whom, it was made. *Amann v. Damm*, 8 C. B., N. S. 597; 22 L. J., C. P. 313. Where the slander is spoken at a meeting, the presence there of reporters, whom the defendant cannot exclude, will not affect the privilege. *Pittard v. Oliver*, (1891) 1 Q. B. 474, C. A.

Where a person, having originated false reports prejudicial to a tradesman, was afterwards called on by the employers of the latter, to examine the matters complained of, and then repeated to them the false statement; it was held that this communication was not privileged. *Smith v. Mathews*, 1 M. & Rob. 151; *Griffiths v. Lewis*, 7 Q. B. 61. The mate of a ship sent a private letter to the defendant, imputing gross misconduct and unfitness to the plaintiff, the captain of it, which defendant showed to the shipowner, who thereupon dismissed the plaintiff. The court were divided as to whether this communication by the defendant to the owner was privileged. In this case the defendant was a stranger to the owner, and not interested in this matter, and he showed it to the owner by the advice of some friends, and appears to have acted in the belief that the owner ought to be informed of the misconduct. *Coxhead v. Richards*, 2 C. B. 569. But, where P., a creditor of the plaintiff, B., believing that B. had committed an act of bankruptcy, and having reason to believe it, gave notice to a person whom B. had commissioned to sell his goods by auction, not to pay over the proceeds to him, "he having committed an act of bankruptcy," it was held that the communication was privileged. *Blackham v. Pugh*, *Id.* 611. So where C., a solicitor, acting in the ordinary course of his duty to his client P., gave such notice on P.'s behalf;

Baker v. Carrick, (1894) 1 Q. B. 838, C. A.; even although given by a letter which was dictated to and written by one clerk, and after signature by C., copied into a letter book by another, in accordance with the ordinary course of business of C.'s office. *Boxsius v. Goblet*, *Id.* 842, C. A. *Accord. Edmondson v. Birch & Co.*, (1907) 1 K. B. 371, C. A., where the defendant was not a solicitor.

The plaintiff and defendant were jointly interested in property of which C. was manager, and the defendant wrote to C. a letter principally about the property and the conduct of the plaintiff with regard thereto, but containing also a distinct charge against the plaintiff with reference to his conduct to his mother: it was held, that though the part of the letter respecting the plaintiff's conduct as to the property, was confidential and privileged, such privilege could not extend to the part relating to his mother. *Warren v. Warren*, 1 C. M. & R. 250. The defendant claimed rent of the plaintiff; the plaintiff denied his liability, whereupon the defendant wrote to the plaintiff's agent (who was in correspondence on the subject) a letter in which he insisted on his claim, and further charged the plaintiff with "a mean and dishonest attempt to defraud;" it was held, that such an imputation, being wholly unnecessary, was not privileged. *Tuson v. Evans*, 12 Ad. & E. 733; see *Cooke v. Wildes*, 5 E. & B. 328; 24 L. J., Q. B. 367; and *Fryer v. Kinnersley*, 15 C. B., N. S. 422; 33 L. J., C. P. 96. But, where the plaintiff requested C. to obtain signatures, protesting against the plaintiff being compelled to resign a charitable trust, held by him, the defendant, when requested by C. to sign, said he would not keep a big rogue like the plaintiff in the trust; on being pressed to give his reasons, he said that the plaintiff had left the parish under discreditable circumstances, without settling with his creditors: it was held that the words were spoken on a privileged occasion. *Cowles v. Potts*, 34 L. J., Q. B. 247. So, where the defendant was requested by C., a clergyman and friend of the plaintiff, to act as arbitrator between one of his parishioners and the plaintiff; this office he refused in a letter to C., which was one of the libels in question. The other was contained in the answer to a letter from a lady, whereby she sought to clear the plaintiff from certain charges brought against him. Both communications were held to be privileged. *Whiteley v. Adams*, 15 C. B., N. S. 392; 33 L. J., C. P. 89. See also *Stuart v. Bell*, (1891) 2 Q. B. 341, C. A. Statements made by the secretary of a society, for the purpose (*inter alia*) of investigating the cases of applicants for charitable relief, in answer to inquiries, as to such applicants, by persons whom he believes to be willing to relieve them, if deserving of relief, are privileged. *Waller v. Lock*, 7 Q. B. D. 619, C. A.

It is the duty of the directors of a joint-stock company to communicate to their shareholders the reports of the auditors; and as it is for the interest of all the shareholders to be informed of the report, the printing and publication of the reports is *prima facie* privileged. *Lawless v. Anglo-Egyptian, &c. Co.*, L. R., 4 Q. B. 262. See also *Edmondson v. Birch & Co.*, *supra*. Though, if the report were circulated among other than shareholders the privilege would cease. *Parsons v. Surgey*, 4 F. & F. 247. Where the defendants, a railway company, dismissed the plaintiff, one of their guards, for neglect of duty, the publication of his name and the cause of his dismissal in a printed monthly circular addressed to the defendant's servants, was held to be privileged. *Hunt v. Gt. N. Ry. Co.*, (1891) 2 Q. B. 189, C. A. Where the plaintiff, a barrister, in a speech made to the Manx House of Keys had violently attacked the defendant, the bishop of the Isle of Man, and the defendant replied to the attack in the House of Convocation; the occasion was held privileged, and the publication of his reply in the local press was also held privileged, that being the medium by which the plaintiff's speech had been circulated. *Laughton v. Bp. of Sodor and Man*, L. R., 4 P. C. 495. The mere fact that the language used, was

stronger than the occasion required is not evidence of malice; *S. C.*, following *Spill v. Maule*, *L. R.*, 4 Ex. 232; accord. *Nerill v. Fine Arts, &c. Insur. Co.*, (1895) 2 Q. B. 156, *C. A.*; (1897) *A. C.* 68, *D. P.*

Words spoken *bonâ fide*, by way of moral advice, are privileged, as if a man writes to a father, advising him to have better regard to his children, and using scandalous words, it is only reformatory, and shall not be intended to be a libel. *Peacock v. Raynell*, 2 Brownl. 151. But, if in such case the publication should be in a newspaper, though the pretence should be reformation, it would be libellous. *R. v. Knight*, *Bac. Abr.*, Libel (A. 2).

Where defamatory words are spoken or written *bonâ fide*, with the view of investigating a fact in which the party is interested, they are privileged. Thus, where the defendant inserted an advertisement in a newspaper to ascertain whether, previously to a certain time, the plaintiff had been married, intending, as the innuendo stated, to insinuate that the plaintiff had been guilty of bigamy, but it appeared that the advertisement was inserted by the authority of the plaintiff's wife, from anxiety to know whether she was legally the wife of the plaintiff, it was justifiable. *Delany v. Jones*, 4 Esp. 191; *Finden v. Westlake*, *M. & M.* 461. So, where the libel was an advertisement for the discovery of the plaintiff, an absconded debtor, and published at the request of a party who had sued out a *capias*, for the purpose of enabling the sheriff to take him. *Lay v. Lawson*, 4 Ad. & E. 795. But if the publication of the libel is more extensive, than necessary for the purpose of obtaining information, it may become actionable. *Browne v. Croome*, 2 Stark. 297. So, although a customer may use words of reasonable remonstrance to a tradesman, yet from the manner, time or place of speaking, there may be evidence of express malice, which takes away the privilege. *Oddy v. Paulet*, 4 F. & F. 1009.

No action will lie, without express malice, for libellous matter contained in a notice forming part of a legal proceeding. *Bank of British N. America v. Strong*, 1 Ap. Ca. 307, *J. C.*

The publication, even though not a verbatim report, of the proceedings of a court of justice, containing defamatory matter, is privileged, if substantially fair and correct. *Currey v. Walter*, 1 B. & P. 525; *Delegal v. Highley*, 3 N. C. 950; *Hoare v. Silverlock*, 9 C. B. 20; 19 L. J., C. P. 215. Proceedings before the registrar under the Bankruptcy Act, 1861, ss. 101, 102, fell within this rule. *Ryalls v. Leader*, *L. R.*, 1 Ex. 296. So, the report of a debate in Parliament; *Wason v. Walter*, *L. R.*, 4 Q. B. 73; or, of proceedings before a committee of the House of Lords; *Kane v. Mulvany*, *L. R.*, 2 C. L. 402, *C. P.*; is privileged. A correct and impartial report of the preliminary inquiries held before magistrates respecting indictable offences, pursuant to 11 & 12 V. c. 42, is privileged if the inquiry be carried on publicly, and the charge be dismissed. *Lewis v. Levy*, *E. B. & E.* 537; 27 L. J., Q. B. 282. So, also, of the proceedings before magistrates duly acting within their jurisdiction where, after parties are heard, a final judgment is given pursuant to the 11 & 12 V. c. 43; see *S. C.*; or the proceedings are of such a nature that they must end in a final decision. *Kimber v. Press Assoc.*, *infra*. But if the inquiry is carried on privately, or if the magistrates have no jurisdiction, a report of the proceedings would be unlawful. *Lewis v. Levy*, *supra*; *McGregor v. Thwaites*, 3 B. & C. 24. Where, however, an application is made to a magistrate in which, supposing the facts to bear out the application, he would have jurisdiction, then he has jurisdiction to consider whether the facts make out the jurisdiction, and a report is privileged. *Usill v. Hales*, 3 C. P. D. 319; see *S. C.*, *Id.* 206, *C. A.* A report of proceedings in open court before magistrates, upon an *ex parte* application for a summons for perjury is privileged. *Kimber v. Press Assoc.*, (1893) 1 Q. B. 65, *C. A.* It has been held in several cases that where the defendant has been committed for trial or held to bail, the report of the proceedings is not privileged. *R. v.*

Lee, 5 Esp. 123; *R. v. Fisher*, 2 Camp. 563; *Duncan v. Thwaites*, 3 B. & C. 583. See, however, *Lewis v. Levy*, E. B. & E. 557; 27 L. J., Q. B. 288; and *Usill v. Hales*, and *Kimber v. Press Assoc.* *ante*, p. 871, *per Cur.* The publication of proceedings on a coroner's inquisition; *R. v. Fleet*, 1 B. & A. 379; or before a commissioner appointed by the Crown for inquiry into certain public bodies; *Charlton v. Watton*, 6 C. & P. 385; when containing defamatory matter, has been held actionable.

The true criterion of the privilege in the case of a report of legal proceedings is, probably, whether it is a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected.

Wason v. Walter, L. R., 4 Q. B. 94, *per Cur.*; *Usill v. Hales*, 3 C. P. D. 326, *per* Ld. Coleridge, C.J.; *Macdougall v. Knight*, 17 Q. B. D. 636, C. A. But, if the report, although substantially correct, be published maliciously, with intent to injure the plaintiff, there is no privilege. *Salmon v. Isaac*, 20 L. T. 885, *cor.* Hannen, J.; *Stevens v. Sampson*, 5 Ex. D. 53, C. A. In these cases the publication was by volunteers, who were not reporters for the public press. See *Id.*, p. 56, *per* Bramwell, L.J.

Where a trial or inquiry lasts several days, a report of each day's proceedings is privileged. *Lewis v. Levy*, *ante*, p. 871. And a report of the judgment, without the evidence, in an action tried without a jury, was held to be privileged. *Macdougall v. Knight*, *supra*. The judgment in this case was affirmed on another ground, 14 Ap. Ca. 194, D. P.; but Ld. Halsbury, C., there intimated that this proposition would not be correct, unless the judgment afforded the reader a reasonable opportunity of judging what conclusion to draw from the evidence at the trial. The principle laid down by the C. A. was, however, followed by them in *Id. v. Id.*, No. 2, 25 Q. B. D. 1.

Contemporaneous reports in newspapers of proceedings publicly heard in Court are now privileged, by 51 & 52 V. c. 64, s. 3, *ante*, p. 866.

The publication of a copy of a register of judgments kept under statutory authority and which the public have a right to inspect is privileged. *Scarles v. Scarlett*, (1892) 2 Q. B. 56, C. A. Thus where the plaintiff's name appeared in a list of county court judgments to which was appended a note that no distinction was made between debt or damages or properly disputed cases, and it was probable that a large portion of the judgments had been settled or paid, it was held that no action lay in the absence of malice. S. C. A similar list without the note was held to be a libel in *Williams v. Smith*, 22 Q. B. D. 134. See *vide per* Ld. Esher, M.R., (1892) 2 Q. B. 62. As to a report as to the conduct of publicans, for use at Brewster sessions, see *Andrews v. Nott-Bower*, (1895) 1 Q. B. 888, C. A.

A report by the General Medical Council, constituted under 21 & 22 Vict. c. 90, that they had (as they in fact had, under sect. 29) removed the name of the plaintiff, a medical practitioner, from the register, and that he had been guilty of infamous conduct in a professional respect, is privileged. *Allbutt v. General Council of Medical Education, &c.*, 28 Q. B. D. 400, C. A.

As to evidence in mitigation of damages, of the correctness of a report, the publication of which cannot be justified, *vide post*, p. 877.

The defendant may contend that the writing is not injurious; as where the editor of a newspaper reported a former trial for libel, in which the plaintiff had recovered a verdict, although the report contained some injurious allegations, yet the judge left it to the jury to say whether, taken altogether, the report was injurious, and the court held that it was rightly so left. *Chalmers v. Payne*, 2 C. M. & R. 156.

Fair comment.] Fair comment on the plaintiff's conduct or literary work falls within the rule of qualified privilege, *vide ante*, pp. 866 *et seq.* *Thomas v.*

Bradbury & Co., (1906) 2 K. B. 627, explaining *Merivale v. Carson*, 20 Q. B. D. 275, C. A., and *Henwood v. Harrison*, L. R., 7 C. P. 606. See also *Dakhyl v. Labouchere*, 23 T. L. R. 364, March 14th, 1907, D. P. A "fair comment" is a relevant comment which is the expression of honest opinion, and is criticism and not mere invective; such comment is no libel. *McQuire v. W. Morning News Co.*, (1903) 2 K. B. 100, C. A. The jury may not "substitute their own opinion of the literary merits of the work for that of the critic, or try the 'fairness' of the criticism by any such standard." S. C. See also *Digby v. Financial News*, (1907) 1 K. B. 502, C. A. A comment actuated by malice is not fair. *Thomas v. Bradbury & Co.*, *supra*. And although the writer of a published article *bonâ fide* believe that what it stated is true, it goes beyond the range of fair criticism if it impute base and sordid motives to the plaintiff. *Campbell v. Spottiswood*, *infra*. *Accord. Joynt v. Cycle Trade Publishing Co.*, (1904) 2 K. B. 292, C. A. See also *Ryan v. Wood*, 4 F. & F. 735. The right to publish a fair criticism is not a peculiar right of the public press, but may be exercised by any private individual. *Kane v. Mulvany*, *ante*, p. 871; *Henwood v. Harrison*, L. R., 7 C. P. 624, *per* Willes, J.; *Campbell v. Spottiswoode*, 3 B. & S. 769, 781; 32 L. J., Q. B. 185, 201, 202.

A public writer may discuss the conduct of magistrates, who dismissed a charge made against the plaintiff, without hearing the whole of the evidence, and also in commenting on the evidence adduced, in support of the view that the decision of the magistrates was erroneous; but he is not entitled to argue in favour of his view from extrinsic facts, not in evidence. *Hibbins v. Lee*, 4 F. & F. 243, *per* Cockburn, C.J.; and see *Hedley v. Barlow*, *Id.* 224, *per Id.* So, comments on the proceedings in, or evidence given before, a court of justice are allowable if made fairly and honestly; *Woodgate v. Ridout*, *Id.* 202, *per Id.*; and even though the inference which the writer draws is incorrect, provided he has acted reasonably, the privilege still continues. *Risk Allah Bey v. Whitehurst*, 18 L. T. 615, *per Id.* So, fair comments may be made on the proceedings in Parliament. *Wason v. Walter*, L. R., 4 Q. B. 73; *Kane v. Mulvany*, L. R., 2 C. L. 402, C. P. So may a fair criticism on a matter of public and national interest and importance. *Henwood v. Harrison*, L. R. 7 C. P. 606; so the sanitary condition of a large number of cottages let by the proprietors of a colliery to their workmen, may be criticized. *S. Hetton Coal Co. v. N. E. News Assoc.*, (1894) 1 Q. B. 133, C. A. But it is not lawful to make false charges against a public officer, nor, on the assumption of their truth, to comment on his proceedings in offensive and injurious language. *Davis v. Shepstone*, 11 Ap. Ca. 187, J. C. In commenting on or referring to legal proceedings, a text-writer must take reasonable care that his statements are accurate, or he will be liable if the misstatement is injurious to another. *Blake v. Stevens*, 4 F. & F. 232.

The defendant may show that the libel is a fair comment, however severe, on a literary work of the plaintiff; but if it contain observations unconnected with the work, and personally slanderous, it is actionable; *Carr v. Hood*, 1 Camp. 355, n.; *Soane v. Knight*, M. & M. 74; *Thompson v. Shackell*, *Id.* 187; *Fraser v. Berkeley*, 7 C. & P. 621; *Strauss v. Francis*, 4 F. & F. 1107; *Campbell v. Spottiswoode*; *Joynt v. Cycle Trade Publishing Co.*, and *Merivale v. Carson*, *supra*; so if it misdescribe the work criticised, S. C. A publication is not a libel which has for its object, not to injure the reputation of any individual but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality; *per* Ld. Ellenborough, C.J., *Tabart v. Tipper*, 1 Camp. 352; *Strauss v. Francis*, *ante*, p. 872. Nor, if the intention is to expose a system of quackery and puffery; *per* Cockburn, C.J., *Hunter v. Sharpe*, 4 F. & F. 983. See also *Dakhyl v. Labouchere*, *supra*.

Handbills or placards are subject to the same freedom of criticism, oral or in writing, as books. *Paris v. Levy*, 9 C. B., N. S. 342; 30 L. J., C. P. 11. So, the editor of a newspaper may comment on any place of public entertainment, if the comment be made fairly, and without malice, or a view to injure or prejudice the proprietor in the eyes of the public. *Per* Ld. Kenyon, *Dibdin v. Swan*, 1 Esp. 28; *McQuire v. W. Morning News Co.*, *ante*, p. 873. And see *Gregory v. Brunswick, Dk. of*, 1 Car. & K. 24, as to criticisms on actors. And, it is not libellous fairly to comment upon a petition relating to matters of general interest, which has been presented to Parliament and published. *Dunne v. Anderson*, Ry. & M. 287; 3 Bing. 88. So, comments on the conduct of persons at a public meeting for the purpose of promoting the election of a candidate for Parliament are privileged. *Davis v. Duncan*, L. R., 9 C. P. 396. So, comments on the conduct of a clergyman in relation to the manner in which he conducts public worship, or uses the church or vestry, are privileged: *Kelly v. Tynling*, L. R., 1 Q. B. 699; but comments in relation to his conduct, in the management of a private charity which he dispenses, are not privileged, but must, if at all, be specially justified by showing their truth; at least where the comments are published by a mere stranger, and in a newspaper. *Gathercole v. Miall*, 15 M. & W. 319; see *Walter v. Brogden*, 19 C. B., N. S. 65, cited *ante*, p. 854. And it has been doubted whether sermons, published only by being preached in church, are the lawful subjects of such public comments. *Gathercole v. Miall*, *supra*. See, however, *Caird v. Sime*, 12 Ap. Ca. 338, D. P.

To justify the criticism the plaintiff must be a person whose position and character are of general interest to the whole country, or the subject-matter must be of such interest; it is insufficient if the interest is limited. *Purcell v. Sowler*, 1 C. P. D. 781. This judgment was affirmed (2 C. P. D. 215, C. A.) on another ground, the C. A. holding the matter was, in that case, of general interest to the whole country. See also *Pittard v. Oliver*, *ante*, p. 869.

A letter which is a libel *per se*, cannot be justifiable, as being a fair and *bonâ fide* comment on the matter contained in a preceding letter. *Walter v. Brogden*, *ante*, p. 854.

Publication in newspapers of reports of public meetings.] There is at common law no privilege for the publication in a newspaper, of *ex parte* defamatory statements made at a meeting of a metropolitan vestry; *Popham v. Pickburn*, 7 H. & N. 891; 31 L. J., Ex. 133; or of a local board of guardians; *Purcell v. Sowler*, 2 C. P. D. 215, C. A.; or of commissioners under a local improvement act. *Davison v. Duncan*, 7 E. & B. 229; 26 L. J., Q. B. 104. Now, however, by the Law of Libel Amendment Act, 1888 (51 & 52 V. c. 64), s. 4, "A fair and accurate report published in any newspaper of the proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above-mentioned bodies, or of any meeting of any commissioners authorized to act by letters patent, Act of Parliament, warrant under the royal sign manual, or other lawful warrant or authority, select committees of either house of parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication at the request of any government office or department, officer of state, commissioner of police, or chief constable of any notice or report issued by them for the information of the public, shall be privileged, unless it shall be proved that such report or publication was published or made maliciously; provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter; provided also, that the

protection intended to be afforded by this section shall not be available as a defence in any proceedings if it shall be proved that the defendant has been requested to insert in the newspaper, in which the report or other publication complained of appeared, a reasonable letter or statement by way of contradiction or explanation of such report or other publication, and has refused or neglected to insert the same: provided further, that nothing in this section contained shall be deemed or construed to limit or abridge any privilege now by law existing, or to protect the publication of any matter not of public concern and the publication of which is not for the public benefit.

“For the purposes of this section ‘public meeting’ shall mean any meeting *bonâ fide* and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted.”

By sect. 1, in the construction of this Act the word “newspaper” has the same meaning as in the stat. 41 & 45 V. c. 60, s. 1, *ante*, pp. 857, 858.

Publication of parliamentary papers.] The publication of a defamatory libel on a private person could not at common law be justified by merely showing that it was part of the printed proceedings of the House of Commons, published by order of the House. *Stockdale v. Hansard*, 9 Ad. & E. 1. But by 3 & 4 V. c. 9, s. 1, all proceedings taken against persons acting under the authority of either house, for the publication of reports, papers, votes or proceedings of either house, shall be stayed on production of a certificate of the lord chancellor, speaker, clerk of the parliament, or clerk of the House of Commons as to the authority for their publication. And, by sect. 2, in case of any proceedings for publishing a copy of such report, paper, &c., the defendant may, at any stage of the proceeding, lay before the court the report, paper, &c., and the copy: and upon verifying the report, &c., and the correctness of the copy by affidavit, the proceedings shall be stayed. By sect. 3, in any proceedings commenced for printing any extract or abstract of such report, &c., the defendant may, under the general issue, give in evidence the report, &c., and show that the extract or abstract was published *bonâ fide*, and without malice: and if such be the opinion of the jury, a verdict of not guilty shall be entered.

Evidence of the truth of the libel or words.] Where the defendant admits the publishing or speaking of the libel or words, he cannot without pleading their truth, give evidence of it even in mitigation of damages, for the matter might have been pleaded as a defence to the action. *Smith v. Richardson*, Willes, 20; 1 Wms. Saund. 120, (1). But evidence admissible and pertinent under another issue, cannot be excluded, merely because it happens incidentally to prove the truth of the libel. *Manning v. Clement*, 7 Bing. 362. In support of a defence alleging the truth of the libel, the defendant cannot prove that the same charges were previously published in another publication, and that the plaintiff took no steps in consequence thereof. *R. v. Newman*, 1 E. & B. 268; 22 L. J., Q. B. 156. When the libel imputes to the plaintiff the commission of a murder under aggravating circumstances, it is necessary to justify the aggravating portion as well as the substantial charge of crime. *Helsham v. Blackwood*, 11 C. B. 111; 20 L. J., C. P. 187. Where a felon has undergone the sentence passed on him for the felony, this operates, under stat. 9 G. 4, c. 32, s. 3, as a pardon, and a libel calling him a felon cannot then be justified. *Leyman v. Latimer*, 3 Ex. D. 15, 353, C. A. Such a libel could be proved, only by proof that the plaintiff had actually committed the felony; proof of conviction only is insufficient. S. C., C. A. Where a railway company stated in a notice, that the plaintiff had been fined, with an

alternative of three weeks' imprisonment, when the period was really 14 days, it was held that it was a question for the jury, whether the libel was substantially true. *Alexander v. N. E. Ry. Co.*, 6 B. & S. 240; 34 L. J., Q. B. 152. See also *Gwynn v. S. E. Ry. Co.*, cited *ante*, p. 863.

Where the plaintiff gives evidence of actual malice, by showing that the words or matter charged, were false to the knowledge of the defendant, the defendant may, under a denial of the publication being malicious, give evidence to rebut the plaintiff's proofs in this respect, by showing that, to the defendant's knowledge, the words or matter charged are true. *Starkie on Libel*, 6th ed. 557. See *Fountain v. Boodle*, 2 Q. B. 1, 12.

Accord and satisfaction.] Accord and satisfaction is a good defence to this action, if pleaded. *Lane v. Applegate*, 1 Stark. 97. In *Boosey v. Wood*, 3 H. & C. 484; 34 L. J., Ex. 65, a defence that, after the commencement of the suit, the plaintiff and the defendant agreed together to accept mutual apologies, to be published by them in their weekly journal, in satisfaction of the right of action, and that these apologies were published accordingly, was allowed.

Statute of Limitations.] By the Limitation Act, 1623, 21 J. 1, c. 16, s. 3, actions upon the case (other than slander) must be brought within six years after the cause of such action; and actions upon the case for words, within two years after the words spoken. Hence the period of limitation in an action of libel is six years. The sale of each copy of a libel being a separate publication, proof of the sale of a single copy within six years rebuts the defence. *Brunswick, Dk. of v. Harmer*, 14 Q. B. 185. The same period applies to an action for words actionable only by reason of special damage; *Saunders v. Edwards*, 1 Sid. 95; but in the case of words actionable, *per se*, or by reason of their having been spoken to the plaintiff in his trade or business, the period is two years; S. C.; even though special damage is alleged in the statement of claim. See *Turner v. Horton*, Willes, 438; *Grenfell v. Pierson*, 1 Dowl. 406; decided on sect. 6.

Evidence that the words were first spoken by another.] It is no defence to an action for slander, for the defendant to show that he heard it from another person, whom he named at the time, or that he heard it as a rumour, without showing that the defendant believed it to be true, and that he spoke the words on a justifiable occasion (as to which *vide ante*, pp. 866 *et seq.*); *McPherson v. Daniels*, 10 B. & C. 263; *Watkin v. Hall*, L. R., 3 Q. B. 396; otherwise this evidence is admissible, if at all, only where the defendant, at the time of speaking the words, gave the name of the person from whom he heard the slander, when it may perhaps be used in mitigation of damages. *Bennett v. Bennett*, 6 C. & P. 588, *per Alderson, B.*; see also *De Crespigny v. Wellesley*, 5 Bing. 392; and *Tidman v. Ainslie*, 10 Exch. 63.

Evidence in mitigation of damages.] By Rules, 1883, O. xxi, r. 4, "No denial or defence shall be necessary as to damages claimed or their amount; but they shall be deemed to be put in issue in all cases, unless expressly admitted." Hence any legal evidence may be given in mitigation of damages, although its effect has not been raised by the defence. But by O. xxxvi., r. 37, "In actions for libel or slander, in which the defendant does not, by his defence, assert the truth of the statement complained of, the defendant shall not be entitled, on the trial, to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial, he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence."

The following cases decided prior to the above rules are cited as illustrating what evidence is admissible in mitigation of damages:—

It was formerly held, that where the defendant pleaded the general issue without a justification, he might prove that the plaintiff had been generally suspected of the offence imputed to him by the defendant. *Leicester, El. of v. Walter*, 2 Camp. 251; — *v. Moor*, 1 M. & S. 284. But Abbott, C.J., refused to admit proof of rumours in *Waithman v. Weaver*, D. & Ry., N. P. 10; 11 Price, 257, n.; and it was afterwards decided that general evidence of the plaintiff's bad character was not admissible in action for a libel. *Jones v. Stevens*, 11 Price, 235. Such evidence was, however (see 2 Starkie, Evid. 3rd ed., 642, n. (e)), admitted by Ld. Tenterden in *Mauby v. Barber*, and by Ld. Denman, C.J., after consulting Parke, B., at York Spring Assizes, 1836, in *Moore v. Ostler*, where the defendant was allowed to give such general evidence, but not to go into particulars; and by the Q. B. in *Duncombe v. Daniel*, cited 7 Dowl. 472. So, in *Richards v. Richards*, 2 M. & Rob. 557, where the slander imputed to the plaintiff that he had been notoriously guilty of an offence, Cresswell, J., after conferring with Wightman, J., admitted proof of rumours, current in the plaintiff's neighbourhood before the uttering of the words, in mitigation under the general issue. The defendant cannot, however, ask as to rumours after the slander complained of, as these rumours may have been occasioned by the slander. *Thompson v. Nye*, 16 Q. B. 175; 20 L. J., Q. B. 85. In *Bell v. Parke*, 11 Ir. C. L. R. 413, in an action by an officer for slander, in charging him with stealing a watch, the statement of an officer of the same regiment, that he had heard rumours that the plaintiff had committed the particular offence imputed to him by the slander, was rejected: as it was said by the court that the cases show that evidence of reputation, as to the plaintiff being guilty of some vicious or criminal habit, can alone be admitted to disprove malice on the part of the defendant, but that he cannot rely upon rumours charging the plaintiff with some particular offence. The above cases were reviewed in *Scott v. Sampson*, 8 Q. B. D. 491, in which case a justification was pleaded, and it was there held that evidence of rumours before the publication of the libel, that the plaintiff had done what was charged in it, or of facts showing the misconduct of the plaintiff, were not admissible, though general reputation would have been admissible. The defendant may in mitigation rely on the plaintiff's conduct in provoking the libel. *Kelly v. Sherlock*, L. R., 1 Q. B. 686.

As to how far evidence is admissible that the words complained of were first used by another, *vide ante*, p. 876.

Though the defendant could not show in justification that the libel is a correct report of a preliminary or *ex parte* proceeding, yet he might, under the general issue, give in evidence the correctness of the report, in mitigation of damages. *East v. Chapman*, M. & M. 46; *Charlton v. Watton*, 6 C. & P. 385. So, where the defendant published an imperfect account of a trial, which was libellous, he was allowed in mitigation, under the general issue, to show that he had copied the statement from another newspaper, but not that it had appeared in other newspapers, which he did not appear to have followed. *Saunders v. Mills*, 6 Bing. 213. This last case was said by Ld. Denman in *Talbutt v. Clark*, 2 M. & Rob. 312, to have been questioned, and he refused to allow the defendant, the editor of a newspaper, to show that the libel had been taken from a letter written and signed by the newspaper correspondent. Accordingly in *Creery v. Carr*, 7 C. & P. 64, Gurney, B., after conferring with six other judges, sitting in the Ex. Ch., rejected evidence to the effect that the libel had appeared in a newspaper, against which the plaintiff had proceeded and recovered damages, but allowed the defendant to show that he had taken his report from that newspaper.

By the Libel Act, 1843 (6 & 7 V. c. 96), s. 1, the defendant may (after notice in writing given at the time of delivering the defence) show, in mitigation, that he made or offered an apology before action brought, or as soon after as he had an opportunity, in case the action was commenced before he had an opportunity. Sect. 2 permitted, in the case of libels in newspapers and other periodical publications, a special defence that the libel was inserted without actual malice, or gross negligence, the publication of a full apology, and payment of money into court. See *Chadwick v. Herapath*, 3 C. B. 885; *O'Brien v. Clement*, 15 M. & W. 435. So much of the section as allowed payment into court was repealed by 42 & 43 V. c. 59 and 46 & 47 V. c. 49, s. 4, and payment into court is now made under Rules, 1883, O. xxii., r. 1, which will operate as an admission of liability. *Vide ante*, pp. 74, 75. The apology must be not only sufficient in its terms, but also inserted in a sufficiently conspicuous part of the paper, and in suitable type: if on issue joined the jury find the apology to be in any of these respects insufficient, there must be a verdict for the plaintiff. *Lafone v. Smith*, 3 H. & N. 735; 28 L. J., Ex. 33; *Risk Allah Bey v. Johnstone*, 18 L. T. 650. In such a case, where the defence is negatived by the jury, damages should be assessed irrespectively of the money paid into court. See *Lafone v. Smith*, 4 H. & N. 158; *Jones v. Mackie*, L. R., 3 Ex. 1, and Rules O. xxii., r. 6 (c). In such case the defendant cannot rely on the payment into court as having been made apart from the statute. *Oxley v. Wilkes*, (1898) 2 Q. B. 56, C. A.; *Slay v. Tillotson*, 14 T. L. R. 546, July, 1898, *cor.* Bruce, J.

The Law of Libel Amendment Act, 1888 (51 & 52 V. c. 64), s. 6, provides that, "At the trial of an action for a libel contained in any newspaper the defendant shall be at liberty to give in evidence in mitigation of damages that the plaintiff has already recovered (or has brought actions for) damages or has received or agreed to receive compensation in respect of a libel or libels to the same purport or effect as the libel for which such action has been brought." By sect. 1, "newspaper" has, in the construction of this act, the same meaning as in 44 & 45 V. c. 60, s. 1, *ante*, pp. 857, 858.

ACTION FOR SLANDER OF TITLE.

This is not strictly an action for defamation, but an action for special damage to the plaintiff by a false and malicious statement affecting his title to property. *Malachy v. Soper*, 3 N. C. 371. It is immaterial whether the words be written or spoken. S. C. To support it, the statement must be false; *Pater v. Baker*, 3 C. B. 831, 868, *per* Maule, J.; and *Rowe v. Roach*, 1 M. & S. 405, is not law; and must be made maliciously; *Brook v. Rawl*, 4 Exch. 521; and the damage must have arisen from the words so uttered. S. C.; *Dicks v. Brooks*, 15 Ch. D. 22, C. A. If the defendant, being interested and not a mere stranger, make the statement, though untrue, *bonâ fide* and on reasonable grounds, he is not liable. *Pitt v. Donovan*, 1 M. & S. 639; *Watson v. Reynolds*, M. & M. 1; *Wren v. Weild*, *post*, p. 879; *Steward v. Young*, L. R., 5 C. P. 122. See *R. Baking Powder Co. v. Wright*, *Crossley & Co.*, 18 Rep. Pat. Cas. 95, 99, *per* Ld. Davey. The action lies at the suit of the legal or equitable owners of the property. *Dunlop Pneumatic Tyre Co. v. Maison Talbot*, 20 T. L. R. 88, *cor.* Walton, J.; reversed on the facts. *Id.* 579, C. A. The actual words used must be set out in the claim, it is not sufficient merely to state their effect. *Gutsole v. Mathers*, 1

M. & W. 495. This action is not an action on the case for words within 21 J. 1, c. 16, s. 3, *ante*, p. 876, and the period of limitation is therefore six and not two years. See *Law v. Harwood*, Cro. Car. 141.

Where the plaintiff sued the defendant for falsely and maliciously writing to manufacturers, and warning them against using the plaintiff's machine, on the ground that it was an infringement of the defendant's patent; it was held that "the action could not lie, unless the plaintiff affirmatively proved that the defendant's claim was not a *bonâ fide* claim, in support of a right which, with or without cause, he fancied he had, but a *malâ fide* and malicious attempt to injure the plaintiff, by asserting a claim of right, against his own knowledge that it was without any foundation." *Wren v. Weild*, L. R., 4 Q. B. 730, 737; *accord. Halsey v. Brotherhood*, 15 Ch. D. 514; 19 Ch. D. 386, C. A. In such case, where it was shown that the defendant had a subsisting patent, the plaintiff could not adduce evidence at the trial, to show that the patent was void, by reason of want of novelty. *Wren v. Weild*, *supra*. Now by the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 V. c. 57), s. 32, "Where any person claiming to be the patentee of an invention, by circulars, advertisements, or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged manufacture, use, sale, or purchase of the invention, any person or persons aggrieved thereby, may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as may have been sustained thereby, if the alleged manufacture, use, sale, or purchase to which the threats related, was not in fact an infringement of any legal rights of the person making such threats: Provided that this section shall not apply, if the person making such threats, with due diligence, commences and prosecutes an action for infringement of his patent." An action brought under this section is known as a "threat's action." A threat by private letter is within this section. *Driffield, &c. Cake Co. v. Waterloo Mills, &c. Co.*, 31 Ch. D. 638; even although it is addressed to a third person, and in answer to an inquiry. *Skinner v. Shew*, (1893) 1 Ch. 413, C. A. So is a solicitor's letter before action. *Combined Weighing, &c. Co. v. Automatic Weighing, &c. Co.*, 42 Ch. D. 665. It may be contained in a circular addressed to the plaintiff's customers, and not being a mere general warning. *Johuson v. Edge*, (1892), 2 Ch. 1, C. A. And the plaintiff in such case is entitled to an inquiry as to damages. S. C. It is no defence that what the defendant did was done *bonâ fide*, or on a privileged occasion. *Skinner v. Shew*, *supra*. In an action under this section the plaintiff must show that there has been no infringement by him; *Barney v. United Telephone Co.*, 28 Ch. D. 394; he may impeach the validity of the defendant's patent. *Kurtz v. Spence*, 36 Ch. D. 770; *Challender v. Royle, Id.*, 425, C. A. An action, to satisfy the proviso, may be brought against any of the persons threatened. S. C. The time within which it must be brought has reference to the date of the threats; S. C.; having regard to all the circumstances. *Colley v. Hart*, 41 Ch. D. 179. The action need not be successful, the plaintiff therein may discontinue it on finding there has been no infringement. S. C. It may have been commenced before the threats action. *Barrett v. Day*, 43 Ch. D. 435. To be within the proviso, the action for infringement must be brought by the person making the threats, against the person whom he has threatened. *Kensington, &c. Electric Lighting Co. v. Lane Fox Electrical Co.*, (1891) 2 Ch. 573; *Combined Weighing, &c. Co. v. Automatic Weighing, &c. Co.*, *supra*. A letter from S. to the plaintiff, stating that by reason of the threats S. could not enter into a contract then in the course of negotiation between them, is admissible to prove the reason. *Skinner v. Shew*, (1894) 2 Ch. 581. In such case the measure of damages is the loss occasioned to the plaintiff by the contract not having been carried out. S. C.

Analogous to the action for slander of title, is an action on the case, for publishing, without lawful occasion, an untrue statement disparaging a man's goods, and thereby causing him special damage. *W. Counties Manure Co. v. Larves Chemical Manure Co.*, L. R., 9 Ex. 218. In such case special damage is essential. *White v. Mellin*, (1895) A. C. 154, D. P.; *R. Baking Powder Co. v. Wright, Crossley & Co.*, 18 Rep. Pat. Cas. 95, D. P. And the statement by one trader W. that his goods are better than those of another trader H., though untrue, and causing loss to H., is not actionable. *Hubbock & Sons v. Wilkinson, &c.*, (1899) 1 Q. B. 86, C. A., following *Young v. Macrae*, 3 B. & S. 264; 32 L. J., Q. B. 6, and *Evans v. Harlow*, cited *ante*, p. 854. See further *White v. Mellin*, *supra*. A false and malicious statement made by the defendant relating to the plaintiff's business, the natural consequence of which was to cause a general loss of business as distinguished from the loss of particular known customers, and has produced that effect, is actionable. *Ratcliffe v. Evans*, (1892) 2 Q. B. 524, C. A.; the damage may be proved by general evidence of the falling off of the business. S. C. The decision in *Riding v. Smith*, 1 Ex. D. 91, was to the same effect, *sed quere?* whether in that case the damage was the natural consequence of the words, see (1892) 2 Q. B. 534, C. A. See also *Evans v. Harries*, 1 H. & N. 251; 26 L. J., Ex. 31; and *Helmore v. Smith*, 35 Ch. D. 449, C. A.

Injunction.] An injunction may be granted to restrain the publication of statements, likely to injure the plaintiff's trade, when they have been proved to be false, and the defendant intends to repeat them. See *Halsey v. Brotherhood*, *ante*, p. 879; *Thorley's Cattle Food Co. v. Missam*, 14 Ch. D. 763, C. A., cited *ante*, p. 863; *Saxby v. Easterbrook*, 3 C. P. D. 339; and 46 & 47 V. c. 57, s. 32, *ante*, p. 879. It cannot be granted where damages would not be recoverable. *White v. Mellin*; *R. Baking Powder Co. v. Wright, Crossley & Co.*, *supra*; *Dunlop Pneumatic Tyre Co. v. Maison Talbot*, 20 T. L. R. 579, C. A. (overruling *Walton, J.*, on the facts); unless damage was imminent, consequent on the defendant's slander. S. C., *Id.* 88, *per Walton, J.*

Costs.] It seems that this action is not within the exceptions in 51 & 52 V. c. 43, s. 56, cited *ante*, p. 301, and that therefore a plaintiff recovering not more than 10*l.* is deprived of his costs by sect. 116, cited *ante*, p. 301, unless he obtain an order for them.

ACTION FOR MALICIOUS PROSECUTION.

The distinction between an action for malicious prosecution and for false imprisonment is pointed out in *Austin v. Dowling*, L. R., 5 C. P. 534, 540, and other cases cited *post*, p. 920. As to what proceedings are criminal in their nature, see *Rayson v. S. London Tramways Co.*, (1893) 2 Q. B. 304, C. A., and cases there cited.

In an action for malicious prosecution the plaintiff may, by proper defences, be put to the proof of—1, the prosecution of the plaintiff; 2, its determination; 3, that the defendant was the prosecutor; 4, his malice and want of probable cause; and 5, the damages sustained.

Evidence of prosecution.] The fact of the prosecution, where instituted in the superior court or quarter sessions, is usually proved by the production of the record, or of an examined copy; B. N. P. 13; which is admissible in evidence, without inquiry into the mode by which the plaintiff became

possessed of it. *Per* Ld. Tenterden, C.J., *Caddy v. Barlow*, 1 M. & Ry. 277; *Lygatt v. Tollervey*, 14 East, 302. The stat. 14 & 15 V. c. 99, s. 13, allows proof to be given of the record by means of a certified copy. See *ante*, p. 101. In an action for malicious prosecution by indicting the plaintiff, it is not sufficient to produce the original bill of indictment (unless it was ignored), a record should be made up and regularly proved. See *ante*, p. 108. Some proof of the identity of the plaintiff and the party prosecuted should be given.

The Rules, 1883, O. xxviii., r. 1 (*ante*, p. 291), have made a variance in the charge made, and that stated in the claim, of comparatively small importance. Where the statement of claim stated a malicious charge of having feloniously stolen certain articles, and the proof was, that the defendant laid an information, in which he deposed that the articles had been stolen, and that he suspected and believed that they had been stolen by the plaintiff, it was held no variance. *Davis v. Noake*, 6 M. & S. 29. See *Byne v. Moore*, 5 Taunt. 187. An allegation that the defendant, maliciously and without probable cause, preferred an indictment, is proved, if *some* of the charges in the indictment were malicious, and without probable cause. *Reed v. Taylor*, 4 Taunt. 617.

If the proceedings were by preferring a charge before a magistrate, the magistrate's clerk should be served with a *subpœna duces tecum* to produce the proceedings. When the information was laid by the defendant, his oath and handwriting should be proved, as also the issuing of the warrant to the constable, &c. The warrant must also be produced and proved, and evidence must be given of the apprehension and detention of the plaintiff under it. 2 Stark. Ev., 3rd ed. 679; and see *Freeman v. Arkell*, 2 B. & C. 495. If the action be for maliciously procuring the plaintiff to be arrested upon a warrant on a charge of felony, and it does not appear that any information has been taken, evidence may be given of the warrant without proving any information. *Newsam v. Carr*, 2 Stark. 69. See also *Clarke v. Postan*, 6 C. & P. 423.

Evidence of determination of prosecution.] It must appear that the prosecution is determined in the plaintiff's favour, where from their nature the proceedings are capable of such a termination. *Arundell v. Tregono*, Yelv. 116; B. N. P. 13; *Basebé v. Matthews*, L. R., 2 C. P. 684; and see *Castrique v. Behrens*, 3 E. & E. 709, 721; 30 L. J., Q. B. 163, 168. But this rule does not apply when, as in the case of exhibiting articles of peace against the plaintiff, the proceedings are *ex parte*, and must of necessity terminate unfavourably to the plaintiff. *Steward v. Gromett*, 7 C. B., N. S. 181; 29 L. J., C. P. 170. The return of *no bill* by the grand jury, or the verdict of acquittal, will be evidence of the determination of the prosecution in the plaintiff's favour. As to proof of acquittal on indictment, see 14 & 15 V. c. 99, s. 13, *ante*, p. 101; and of dismissal of the information in summary proceedings, *vide ante*, p. 109. An action lies, though the plaintiff was acquitted on a mere defect in the indictment. *Wicks v. Fentham*, 4 T. R. 247; *Pippet v. Hearn*, 5 B. & A. 634. If the plaintiff were summarily convicted, the action is not maintainable, even though no appeal lay from the conviction. *Basebé v. Matthews*, *supra*. See also *Bynoe v. Bank of England*, (1902) 1 K. B. 467, where it was held that no action lies against a witness for negligently giving false evidence which caused the plaintiff to be wrongfully convicted of a crime, while the conviction stands.

Evidence that the defendant was prosecutor.] The proper evidence to establish this fact is, that the defendant employed a solicitor or agent to conduct the prosecution; that he gave instructions concerning it; paid the expenses; procured the attendance of witnesses, or was otherwise

active in forwarding the prosecution. 2 Stark. Ev., 3rd ed., 678. Proof of the information of the defendant taken by the magistrate is sufficient for this purpose. See 2 Selw. N. P., 13th ed., 1014. Or of the recognizance to prosecute entered into by the defendant, though this is by no means conclusive, as the recognizances are often hurriedly filled up. *Eagar v. Dyott*, 5 C. & P. 4. The indorsement of the defendant's name on the bill is evidence that he was sworn as witness, but not of his being prosecutor. B. N. P. 14. One of the grand jury before whom the bill was preferred may be called to prove that the defendant was the prosecutor; *Sykes v. Dunbar*, 2 Selw. N. P., 13th ed. 1015; but this has been questioned. Stark. Ev. 4th ed. 193, 194. Where the proceeding was before a magistrate, he may be called to prove it. *Freeman v. Arkell*, 2 B. & C. 494. Where the defendant's son, aged 17, had caused the plaintiff to be taken before a magistrate, by whom he was remanded, and the defendant upon hearing of the matter, said that as his son had begun it he would not interfere, this was held to be no evidence of authority or subsequent ratification by the father. *Moon v. Towers*, 8 C. B., N. S. 611. And where a summons was issued by the servant of the defendants without their knowledge, and they were merely informed of it, and attended the hearing, it must be proved that the prosecution was proceeded with by them, without reasonable or probable cause. *Weston v. Beeman*, 27 L. J., Ex. 57. As to the authority of a servant to prosecute so as to make his master liable, see *Bank of New S. Wales v. Owston*, 4 Ap. Ca. 270, J. C.

Evidence of malice.] It is essential that the plaintiff should give some evidence of the defendant's malice, where it is denied. *Porter v. Weston*, 5 N. C. 715. Personal enmity is evidence of malice, but any indirect motive is sufficient. Proof of an acquittal for want of prosecution is not even *prima facie* evidence of malice. *Purcell v. Macnamara*, 9 East, 361. If the plaintiff prove want of probable cause, malice may be inferred. *Burley v. Bethune*, 5 Taunt. 583; *Heath v. Heape*, 26 L. J., M. C. 49, Ex. But for this purpose, the want of probable cause must be proved to the satisfaction of the jury. *Hicks v. Faulkner*, 8 Q. B. D. 167, 175, *per cur.*; *accord. Quartz Hill Gold Mining Co. v. Eyre*, 11 Q. B. D. 687, *per Brett, M.R.* And the want of probable cause is not conclusive evidence of malice. *Mitchell v. Jenkins*, 5 B. & Ad. 588; but is only evidence for the jury together with the other facts of the case. *Brown v. Hawkes*, (1891) 2 Q. B. 718, C. A. Where an agent of the defendant, in his absence and without his knowledge, summoned the plaintiff on a charge of felony, which was dismissed, the defendant being present at the hearing only, the want of probable cause was held to be no evidence of malice against him. *Weston v. Beeman, supra*. Proof that the defendant published an advertisement of the finding of the indictment, with other scandalous matter, is evidence of malice. *Chambers v. Robinson*, Str. 691. See *Caddy v. Barlow*, 1 M. & Ry. 275; *Haddrick v. Heslop*, 12 Q. B. 267. The question of malice must in terms be left to the jury. *Payne v. Revans*, 9 W. R. 693, E. T. 1861, Q. B.

It seems that a corporation can be guilty of malice, so as to be liable to this action. *Edwards v. Midland Ry. Co.*, 6 Q. B. D. 287; *Corusford v. Carlton Bank*, (1899) 1 Q. B. 392, affirm. in C. A. (the defendant's counsel not arguing the point), (1900) 1 Q. B. 22; see also *Bank of New S. Wales v. Owston*, 4 Ap. Ca. 282, *per J. C.*; and *Citizens Life Assur. Co. v. Brown*, cited *ante*, p. 860. The authorities *seens*, are *Stevens v. Midland Counties Ry. Co.*, 10 Exch. 352; 23 L. J., Ex. 328, *per Alderson, B.*; *Abrath v. N. E. Ry. Co.*, 11 Ap. Ca. 247, 250, *per* Ld. Bramwell. See also S. C., 11 Q. B. D. 446, n.

Evidence of want of reasonable and probable cause—Question, how determined.] The onus of proving the want of reasonable and probable cause, and of proving the existence of such facts as are evidence of such want, lies on the plaintiff. *Abrath v. N. E. Ry. Co.*, 11 Q. B. D. 440, C. A.; 11 Ap. Ca. 247, D. P.; *Walker v. S. E. Ry. Co.*, L. R., 5 C. P. 640, 644. Where the prosecution was before a magistrate, this proof is frequently given, by putting the depositions taken before him, in evidence. S. C. A certified copy may be obtained from the magistrate's clerk, by aid of a *fiat* of the A.-G., if necessary.

Where there are no facts, nor any inference from facts in dispute, "reasonable and probable cause" was always held to be a question to be determined by the judge alone. *Panton v. Williams*, 2 Q. B. 169, 192, Ex. Ch.; *Michell v. Williams*, 11 M. & W. 205. Where, however, the question of reasonable and probable cause depends on numerous and complicated facts, and inferences to be derived from them, there is much confusion in the earlier cases, as to the respective provinces of judge and jury. It is now, however, settled that the question must be decided by the judge in this case also; it is his duty to inform the jury, if they find the facts proved, and the inferences to be warranted by such facts, that the same do, or do not, amount to reasonable and probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge. *Panton v. Williams*, *supra*; *Lister v. Perryman*, L. R., 4 H. L. 521; *Brown v. Hawkes*, *ante*, p. 882. In a case in which the defendant had preferred an indictment for an assault, committed in removing him from the plaintiff's house, the judge told the jury, that if the defendant knew he was in the wrong when he preferred the indictment, then there was no probable cause: held, that this must be taken to have meant, was the assault committed under circumstances, that no reasonable man could have supposed that it was excessive? and that therefore the direction was substantially correct. *Hinton v. Heather*, 14 M. & W. 131. It is the practice for the judges at Nisi Prius to give hypothetical directions to the jury, or to submit to them certain facts, and then upon receiving their finding upon them, to decide as to reasonable and probable cause. As, however, as has been before stated, the decision of questions of disputed fact, the motive and malice of the defendant, his knowledge of those facts, and belief in the plaintiff's guilt, and in the existence of probable cause, are all questions for the jury. See *Turner v. Ambler*, 10 Q. B. 252; *Heslop v. Chapman*, 23 L. J., Q. B. 49, Ex. Ch.; *Douglas v. Corbett*, 6 E. & B. 511; *Shrobery v. Osmaston*, 37 L. T. 792, C. P.; *Hicks v. Faulkner*, *post*, p. 884. Where there is a defence stating certain facts, as constituting reasonable and probable cause, it is sufficient to prove so much of the defence as, in the opinion of the judge, constitutes reasonable and probable cause. *Hailes v. Marks*, 7 H. & N. 56; 30 L. J., Ex. 389.

No definite rule can be laid down as to what amounts to reasonable and probable cause; the judge must determine the question on the facts of each case. *Lister v. Perryman*, *post*, p. 884. "In order to justify a defendant there must be a reasonable cause—such as would operate on the mind of a discreet man; there must also be a probable cause—such as would operate on the mind of a reasonable man; at all events such as would operate on the mind of the party making the charge; otherwise there is no probable cause for him." *Broad v. Ham*, 5 N. C. 725, *per* Tindal, C.J.; *Lister v. Perryman*, *post*, p. 884; *Shrobery v. Osmaston*, *supra*. If a man act *bonâ fide*, upon the honest belief of the truth of statements made to him by others, whom he believes to be credible persons, he is justified in acting upon such statements, if he believe there is reasonable and probable

cause for so doing. *Chatfield v. Cornford*, 4 F. & F. 1008, *cor.* Cockburn, C.J. See also *Abrath v. N. E. Ry. Co.*, and *Walker v. S. E. Ry. Co.*, *ante*, p. 883. So, where the defendant, acting on the faith of information given to him by his own coachman, the most material part of which was derived from R., gave the plaintiff into custody, without making any personal inquiry of R.; it was held that the mere absence of such inquiry, did not show the absence of reasonable and probable cause. *Lister v. Perryman*, L. R., 4 H. L. 521. See also *Brown v. Hawkes*, (1891) 2 Q. B. 718, C. A. And if a man's recollection be ordinarily trustworthy, he is justified in honestly acting on it, although he is mistaken in the particular instance, in which he so acts. *Hicks v. Faulkner*, 8 Q. B. D. 167.

Proof of the strongest malice is no evidence of want of probable cause, if it be proved that the defendant was cognizant of circumstances which led to a legal and reasonable suspicion that the plaintiff was guilty of an offence against the law, and upon which he *might* have acted. *Johnstone v. Sutton*, 1 T. R. 545, Ex. Ch.; *Turner v. Turner*, Gow, 20. But, if it can clearly be proved that the defendant, under such circumstances, did not believe that he had a legal right to prosecute, this is evidence of want of reasonable cause. *Turner v. Ambler*, 10 Q. B. 252. Therefore in *Delegat v. Highley*, 3 N. C. 950, the defendant was required to show that, at the time of the prosecution, he knew of the facts upon which he relied as a defence. And the belief or disbelief of the defendant, is a question for the jury; *Taylor v. Willans*, 2 B. & Ad. 857, where also it is said that slight evidence of the defendant's knowledge of the insufficiency of his charge, is all that is required, as it is difficult to prove a negative. Abandoning the prosecution is not, of itself, sufficient evidence of want of probable cause. *Incedon v. Berry*, 1 Camp. 203, n. Nor, neglecting to prefer an indictment after a charge laid. *Wallis v. Alpine*, *Id.*, 204, n.; *Willans v. Taylor*, 6 Bing. 183. So, proof that the bill was thrown out by the grand jury has been held no evidence of the want of probable cause; *Byne v. Moore*, 5 Taunt. 187; but in *Nicholson v. Coghill*, 4 B. & C. 23, it was said *obiter* by the court, that evidence of the bill having been thrown out by the grand jury is sufficient to warrant an inference of the absence of probable cause; at least where the facts are wholly within the defendant's knowledge. Where the defendant charged the plaintiff with felony, the taking being under a claim of lien, and defendant, after the apprehension of the plaintiff, admitted to him, "that he knew that he (plaintiff) did not intend to steal the article taken," it was held evidence of want of probable cause. *Huntley v. Simson*, 2 H. & N. 600; 27 L. J., Ex. 134; and see *Venafra v. Johnson*, 10 Bing. 301; *Musgrove v. Newall*, 1 M. & W. 582.

If the defendant have laid all the facts of the case fully and fairly before counsel, and acted *bonâ fide* upon the opinion given (however erroneous it may be) it will be evidence to prove probable cause. *Per* Bailey, J., *Ravenga v. Mackintosh*, 2 B. & C. 697; *Hewlett v. Crutchley*, 5 Taunt. 277; *Abrath v. N. E. Ry. Co.*, 11 Q. B. D. 440, C. A.; 11 A. C. 247, D. P. It has been said that where the facts lie in the knowledge of the defendant himself, he must show probable cause, though the indictment was found by the grand jury; otherwise the plaintiff shall recover without proving express malice. *Parrott v. Fishwick*, B. N. P. 14. But, this position is not supported by another report in the same case, 9 East, 362, n., from which it appears that the plaintiff having been acquitted upon the indictment, Ld. Mansfield said, "it was not necessary to prove express malice, for if it appeared that there was no probable cause, that was sufficient to prove an implied malice, which was all that was necessary to be proved to support this action; for in this case all the facts lay in the defendant's own knowledge, and if there was the

least foundation for the prosecution, it was in his power and incumbent on him to prove it." It seems therefore from this last report that some evidence of want of probable cause had been given, from which malice was inferred, and that the question was, whether it was incumbent upon the plaintiff to go further. Where the defendant was the only witness upon the indictment, *Ld. Kenyon* held that the proof of malice lay upon the plaintiff. *Sykes v. Dunbar*, 1 Camp. 202, n. But, it would seem that by the word *malice* in this case, absence of belief on the part of the defendant, that he had acted lawfully, was meant.

Where the defendant presented two bills for perjury against the plaintiff, but did not himself appear before the grand jury, and the bills were ignored; he then presented a third bill, and upon his own testimony it was found. The prosecution was kept suspended by the defendant for three years, till the plaintiff took the record down to trial, when the defendant declined to appear as a witness, although in court and called; the plaintiff was acquitted. It was held that this was *prima facie* evidence of want of probable cause. *Willans v. Taylor*, 6 Bing. 187; Ex. Ch., 2 B. & Ad. 845.

Proof of circumstances attending a felony, which might have justified the defendant in making inquiries concerning the plaintiff, do not amount to evidence of reasonable and probable cause. *Bussell v. Gibbons*, 30 L. J., Ex. 75. And where it appeared that the plaintiff refused to give up a forged note, which he had taken in the course of business, to the defendant, a bank inspector; and the defendant, in the absence of all circumstances of suspicion, charged the plaintiff before a magistrate with feloniously having the note in his possession: this was held to be evidence of want of probable cause. *Brooks v. Warwick*, 3 Stark. 389.

Where an action is for a malicious indictment for perjury, in which there are several assignments of perjury, the plaintiff is entitled to recover, if he show that as to one of them there was no probable cause. *R. v. Prosser*, cited 1 T. R. 533; *Delisser v. Towne*, 1 Q. B. 333. Where the plaintiff's counsel offers no evidence as to the want of probable cause, for one of the several assignments of perjury in the indictment, it is not competent for the defendant to show probable cause as to that. *Ellis v. Abrahams*, 8 Q. B. 709.

The observations of the judge on the trial of the indictment, tending to cast censure on the mode in which the prosecution had been conducted, were admitted for the plaintiff, by *Littledale, J.*, in *Warne v. Terry*, Winton Sum. Ass. 1836, on the same principle on which the hesitation of the jury had been held by *Lord Kenyon* to be evidence by the defendant of probable cause (see *Smith v. Macdonald*, 3 Esp. 7, *post*, p. 886); but in *Barker v. Angell*, 2 M. & Rob. 371, *Ld. Denman, C.J.*, refused to admit such proof, and in *Wetzlar v. Zachariah*, 16 L. T., 432, *Mellor, J.*, refused to admit evidence of what a magistrate said in dismissing the charge against the plaintiff, on the ground that, although it was said in the defendant's presence, the defendant had no opportunity of replying to it. And upon this ground it would seem that such evidence is not admissible in either case. At most, it only shows the opinion of the judge or jury (or some of the jury) on the evidence at the trial of the indictment; the evidence in the action may be very different.

As to reasonable cause for issuing a search warrant for a woman under 48 & 49 V. c. 69, s. 10, see *Hope v. Evered*, *post*, p. 886.

Damages.] The jury may give damages for the loss of reputation, the imprisonment, if any has taken place, and the expenses incurred by the plaintiff in making his defence. B. N. P. 13. Loss of a chance of engagement in a situation, by reason of the imprisonment, is too remote to be recovered as damages. *Hoey v. Felton*, 11 C. B., N. S. 143; 31 L. J., C. P.

105. In the case of an indictment of several persons for a conspiracy, where all rely on the same matter of defence, any one may be hable for and pay, and subsequently recover, all the costs; but if different grounds of defence are relied on, the same rule does not apply. *Rowlands v. Samuel*, 11 Q. B. 39. See further as to the amount of damages, *post*, p. 891.

A remand is the act of a magistrate, and it seems that it may be sued for in this form of action. See *Lock v. Ashton*, 12 Q. B. 871.

Defence.

In order to show probable cause for the prosecution, the defendant has been allowed to prove that the jury deliberated long on the trial of the indictment. *Smith v. Macdonald*, 3 Esp. 7; *sed vide ante*, p. 885. Ld. Kenyon ruled that the defendant might give evidence of the plaintiff's bad character; *Rodriguez v. Tadmire*, 2 Esp. 721; but in later cases such evidence has been refused, on the ground that it affords no proof of probable cause to justify the defendant. *Newsam v. Carr*, 2 Stark. 70; *Cornwall v. Richardson*, Ry. & M. 305; see also *Downing v. Butcher*, 2 M. & Rob. 374. The defendant cannot give evidence of matters collateral to the subject of the action, with a view of showing what was passing in his mind at the time of doing the act complained of. *Wetzlar v. Zachariah*, *ante*, p. 885. It is no answer that the defendant was bound over to prosecute, if the jury think that he maliciously caused himself to be so bound, by making an unfounded charge. *Dubois v. Keats*, 11 Ad. & E. 329. Where the defendant falsely swore a fact at a trial, and the plaintiff on swearing the contrary was committed by the judge for perjury, and the defendant bound over to prosecute; the defendant prosecuted, and repeated his false evidence to the grand jury, he was held liable to an action for malicious prosecution. *Fitzjohn v. Mackinder*, 9 C. B., N. S. 505; 30 L. J., C. P. 257, Ex. Ch.

The statutory defences given by the Larceny Act (24 & 25 V. c. 96), s. 113, for things "done in pursuance of the Act," do not apply to a private person prosecuting for an offence against that act. *Mercer v. Gooch*, 15 L. T. 219, M. T. 1866, Ex. See further, Part III., *sub tit. Actions against persons acting in execution of statutes*, *post*, pp. 1141 *et seq.*

Where a magistrate has issued a search warrant under 48 & 49 V. c. 69, s. 10, to search for a woman who is, it is suspected, detained for immoral purposes, his decision that there is reasonable cause for such suspicion is a protection to a person who *bonâ fide* applied for such warrant. *Hope v. Evered*, 17 Q. B. D. 338. So where the warrant was also to arrest a person alleged to be unlawfully detaining her. *Lea v. Charrington*, 23 Q. B. D. 45; affirm. in C. A. *Id.* 272, on the ground that there was no evidence of want of reasonable and probable cause.

ACTION FOR MALICIOUS ARREST AND ABUSE OF CIVIL PROCESS.

After the passing of the act abolishing arrest for debt on mesne process (1 & 2 V. c. 110), actions for malicious arrest became infrequent. Now, by the Debtors Act, 1869 (32 & 33 V. c. 62), Part. I., imprisonment for debt on mesne process has been entirely, and on final process practically, abolished. The provisions of the sections of this act relating thereto are shortly as follows:—

Sect. 4 (amended by 41 & 42 V. c. 54, s. 1), provides that no person

shall be arrested or imprisoned for making default in payment of a sum of money, with certain exceptions therein mentioned, in which case the imprisonment shall not exceed one year.

By sect. 5, a person making default in payment of any debt, or instalment of any debt, due from him in pursuance of any order or judgment, may be committed to prison for any time not exceeding six weeks, or till the debt is paid, provided he be shown to have had the means of payment since the order or judgment, and has refused or neglected to pay the same.

By sect. 6, "*a person shall not be arrested upon mesne process in any action.*" (Repealed by 56 & 57 V. c. 54.)

"Where the plaintiff in any action in any of her Majesty's superior courts of law at Westminster, in which, if brought before the commencement of this act, the defendant would have been liable to arrest, proves at any time before final judgment by evidence on oath, to the satisfaction of a judge of one of those courts, that the plaintiff has good cause of action against the defendant to the amount of 50*l.* or upwards, and that there is probable cause for believing that the defendant is about to quit England, unless he be apprehended, and that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, such judge may, in the prescribed manner, order such defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given the prescribed security, not exceeding the amount claimed in the action, that he will not go out of England without the leave of the court.

"Where the action is for a penalty or sum in the nature of a penalty, other than a penalty in respect of any contract, it shall not be necessary to prove that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, and the security given (instead of being that the defendant will not go out of England) shall be to the effect, that any sum recovered against the defendant in the action shall be paid, or that the defendant shall be rendered to prison."

By sect. 10, general rules and orders may be made for the purpose of carrying into effect this part of the Act, and rules so made are termed "prescribed." The Rules, 1883, O. xlii., r. 25, and O. lxix. have been made thereunder.

The jurisdiction of the High Court under sect. 5 is now, by the Bankruptcy Act, 1883, s. 103, and Bankruptcy Rules, 1883, r. 265, vested in the bankruptcy registrars.

An order may be made under sect. 6 when the plaintiff has any cause of action to the extent of 50*l.*; but, in other than penal actions, only where the plaintiff requires the presence of the defendant for the purpose of evidence: see *Yorkshire Engine Co. v. Wright*, 21 W. R. 15, T. T. 1872, Ex.; and, on final judgment, the defendant is entitled to be released. S. C.; *Hume v. Druyff*, L. R., 8 Ex. 214. The section does not interfere with the issue of the writ of *ne exeat regno*. *Sobey v. Sobey*, L. R., 15 Eq. 200. As to an action for the improper issue thereof, see *Lees v. Patterson*, 7 Ch. D. 866.

An action may still be maintained for falsely or fraudulently, and maliciously, and without reasonable or probable cause, making or procuring an affidavit under sect. 6, *supra*, and thereby obtaining a judge's order for the plaintiff's arrest. See *Daniels v. Fielding*, 16 M. & W. 200. An action may also be maintained when it appears that proceedings have been taken against the plaintiff, in order to effect some object not within the scope of the process. See *Grainger v. Hill*, 4 N. C. 212.

An action cannot be maintained for an arrest, made maliciously and without reasonable cause, upon a *ca. sa.* issued on a subsisting unsatisfied judgment. *Huffer v. Allen*, L. R., 2 Ex. 15.

Under the old Bankruptcy Acts, under which the proceedings were ex

parte, an action was maintainable for falsely and maliciously, and without reasonable and probable cause, procuring a man to be made a bankrupt; *Parley v. Danks*, 4 E. & B. 493; 24 L. J., Q. B. 244; even although the affidavit on which the adjudication was granted did not allege an act of bankruptcy, and the adjudication was therefore erroneous. S. C. And it seems, notwithstanding the doubts expressed by Martin, B., in *Johnson v. Emerson*, L. R., 6 Ex. 379, that such action will lie in respect of a receiving order, made under the Bankruptcy Act, 1883, although the proceedings are not *ex parte*. See *Wyatt v. Palmer*, (1899) 2 Q. B. 106, C. A.; *Quartz Hill, &c. Gold Mining Co. v. Eyre*, 11 Q. B. D. 684, 693, *per C. A.*

So an action will lie, for falsely and maliciously, and without reasonable and probable cause, presenting a petition under the Companies Acts, 1862, 1867, to wind up a trading company. S. C. In such case, special damage need not be proved, as the presentation of the petition, from its nature, is likely to injure the credit of the company. S. C. As to what is reasonable and probable cause in such case, see *King v. Henderson*, (1898) A. C. 720, J. C.

It has been said that the bringing of an action maliciously, and without reasonable and probable cause, by A. against B., whereby B. sustains legal damage, gives B. a right of action against A. See judgment in *Wren v. Weild*, L. R., 4 Q. B. 730, 736, and cases therein cited, and *Cotterell v. Jones*, 11 C. B. 713; 21 L. J., C. P. 2. The liability to pay extra costs is not, however, legal damage. S. C.; *Quartz Hill, &c. Gold Mining Co. v. Eyre*, 11 Q. B. D. 674, 682, 689, *per C. A.* In this case the court intimated that the action would not lie, because no legal damage *could* ensue.

Proceedings under the Lunacy Act, 1890, 53 & 54 V. c. 5, are protected if taken in good faith and with reasonable care; sect. 330.

It seems that an action will lie for the wrongful and malicious arrest of a ship under Admiralty process, although there be no actual damage. *The Walter D. Walleth*, (1893) P. 202, 207.

In an action for malicious arrest the plaintiff may have to prove the affidavit for the judge's order to arrest; its falsehood; the order for the arrest; the arrest under it; the rescission of the order, or the determination of the suit; the defendant's malice and want of reasonable or probable cause; and the damage.

The following cases were all decided before the Debtors Act, 1869, *ante*, p. 886, came into force; but, as they may be usefully referred to in cases arising under the new practice, they have been retained.

The affidavit to hold to bail, or to obtain the order for arrest.] The plaintiff should be prepared to prove the affidavit to obtain the order for arrest. *Crook v. Dowling*, 3 Doug. 75; B. N. P. 75; *Casburn v. Reid*, 2 B. Moore, 60. As to this proof, see *ante*, p. 114.

The judge's order for the arrest.] As to proof of this, see *ante*, p. 112.

The falsehood of the affidavit, or fraud in obtaining the order.] This is now an essential part of the plaintiff's proof. See *Daniels v. Fielding*, 16 M. & W. 200, 206.

The arrest under the order.] To prove the arrest the plaintiff may call the sheriff's officer. As to what evidence amounts to an arrest, *vide post*, p. 921.

In one case, though the return of *cepi corpus* appeared on the writ of *apias*, Ld. Kenyon ruled that, as against the defendant, there was no

evidence of the arrest having been under the writ, and the plaintiff, not being able to prove the warrant, was non-suit. *Lloyd v. Harris*, Peake, 174. But it seems that the sheriff's return was *prima facie* evidence of the fact therein stated. *Gylford v. Woydgate*, 11 East, 297; *Rogers v. Hscombe*, 2 Esp. Dig., N. P. 38, *vide ante*, pp. 59 *et seq.* And proof of the warrant was unnecessary when the defendant had admitted that the arrest took place under the writ. *Petrie v. Lamont*, 3 M. & Gr. 702.

It does not appear that the sheriff, under the present process, makes any return to the order for arrest.

[*Rescission of the judge's order, or determination of the suit.*] In an action for malicious arrest it is necessary to allege and prove that the original proceeding, which formed the alleged ground of the action, is at an end; such allegation, if denied, must be specially traversed. *Watkins v. Lee*, 5 M. & W. 270. It is necessary to show that the proceeding complained of, terminated in such a way so favourable to the plaintiff, as to give him a right of action, and the proof must correspond with the allegation. *Combe v. Capron*, 1 M. & Rob. 398. Proof of a rule to discontinue, and that the costs had been accordingly taxed and paid, was sufficient evidence of the determination of the suit. *Bristow v. Haywood*, 4 Camp. 214; *Gadd v. Bennett*, 5 Price, 540; *Brandt v. Peacock*, 1 B. & C. 649. So, a rule to stay proceedings, and to deliver up to the then defendant a bill of exchange upon which the action was brought. *Brook v. Carpenter*, 3 Bing. 297. But, see *Kirk v. French*, 1 Esp. 80. In an action for an arrest upon a plaint in the Sheriff's Court at London, evidence was given that the usual course of that court, upon the abandonment of a suit by the plaintiff, was to make an entry in the minute-book of "withdrawn"; it was held that proof of such entry in the minute-book was sufficient to prove the determination of the suit. *Arundell v. White*, 14 East, 216. The termination must be such as to afford *prima facie* evidence that the suit was without foundation: therefore, where it appeared that a *stet processus* had been entered by consent, the plaintiff was non-suited, for the defendant might perhaps have recovered in the former action if the plaintiff had not stopped it by consent. *Wilkinson v. Howel*, M. & M. 495.

In *Parton v. Hill*, 12 W. D. 733, E. T. 1864, Q. B., where the declaration alleged that the defendant falsely and maliciously, and without any reasonable or probable cause, swore an affidavit that the plaintiff was indebted to him, and procured his goods, &c., to be attached in the Mayor's Court, it was held to be necessary to show that the suit had terminated in the plaintiff's favour. But an action for abuse of process, in order to extort money from the plaintiff, as where the defendant issued several writs against the plaintiff in respect of the same cause of action, is not in the nature of an action for malicious arrest, so as to make it necessary to aver or prove a determination of the suit, or the want of probable cause. *Grainger v. Hill*, 4 N. C. 212; *Heywood v. Collinge*, 9 Ad. & E. 268. See *Steward v. Gromett*, 7 C. B., N. S. 191; 29 L. J., C. 170, cited *ante*, p. 881. Where it appeared the judgment creditor had maliciously indorsed a *ca. sa.*, with directions to levy more than was due, and that the plaintiff before his arrest had tendered the true amount of his debt, it was held that the plaintiff need not show that he had procured his discharge from custody before bringing the action. *Gilding v. Eyre*, 10 C. B., N. S. 592; 31 L. J., C. P. 174. In an action for maliciously procuring the plaintiff's bankruptcy, it is necessary to aver, and, if traversed, prove, that the adjudication was set aside before the commencement of the action. *Metropolitan Bank v. Pooley*, 10 Ap. Ca. 210, D. P., following *Whitworth v. Hall*, 2 B. & Ad. 695. So now it must be proved that the receiving order has been set aside.

Evidence of malice and want of probable cause.] It lies upon the plaintiff in this action, as in the action for a malicious prosecution, to prove both malice and the want of probable cause. *Watkins v. Lee, supra; Hounsfield v. Drury*, 11 Ad. & E. 98. As in an action for malicious prosecution, the want of probable cause is evidence of malice, and whether the facts amount to want of probable cause is generally a question for the judge. See the cases *ante*, pp. 883 *et seq.*; and *Gibbons v. Alison*, 3 C. B. 181. Proof that the suit was discontinued was held by Ld. Ellenborough not to be evidence of want of probable cause; *Bristow v. Haywood*, 1 Stark. 50: but in a later case, where the plaintiff had arrested the defendant on an affidavit of debt for money paid to his use, but did not declare until ruled to do so, and a few days afterwards discontinued the action and paid the costs, this was held to be evidence to go to the jury, of malice and the want of probable cause. *Nicholson v. Coghill*, 4 B. & C. 21; *Webb v. Hill*, M. & M. 253. That the defendant suffered himself to be non-prossed in the former suit was held not to be evidence to support this action. *Sinclair v. Eldred*, 4 Taunt. J. However, in a previous case of *Hamilton v. Reddell, coram Pratt, C.J.*, Bearcroft's MSS. 22, not cited in *Sinclair v. Eldred, supra*, it was ruled that the defendant's suffering the former action to be non-prossed was sufficient *prima facie* evidence of malice; and *per Pratt, C.J.*, "The defendant's never proceeding, and suffering a non-pros, is, in my opinion, *prima facie* evidence of malice. I hold most clearly that the affidavit, arrest, bail, and non-pros, make up sufficient *prima facie* evidence to call for a defence." Where there were mutual dealings between the plaintiff and the defendant, and items were known to be due on both sides of the account, an arrest for the amount of one side only, without deducting what was due on the other, was malicious and without probable cause. *Austin v. Debnam*, 3 B. & C. 139, overruling *Brown v. Pigeon*, 2 Camp. 594. Taking a less sum out of court and not proceeding in the suit, was not enough in itself to show want of probable cause of action for a larger sum. *Jackson v. Burleigh*, 3 Esp. 34. The plaintiff hearing, while at a port in Northumberland, that the defendant, who was in London, intended to arrest him, paid the debt to the defendant's agent, and took a receipt; more than a month afterwards the plaintiff was arrested in London by the defendant's attorney, upon a writ grounded upon the original affidavit of debt; it was held that these facts afforded no evidence of malice. *Gibson v. Chaters*, 2 B. & P. 129. A. by mistake sued out a bailable writ against B., and the officer told B. of it, but did not take him into actual custody; on the mistake being discovered, B. was told that he need give himself no further trouble in the matter, but he afterwards put in bail and incurred an expense of 14*l.*; it was held that no action lay, there being no arrest, nor any inconvenience, except what he had voluntarily incurred. *Bieten v. Burrridge*, 3 Camp. 139. So, where the plaintiff was actually arrested on a bill which purported to be, but was not in fact, accepted by him, it was ruled that no action lay; the defendant having acted through mistake and without malice. *Spencer v. Jacob*, M. & M. 180. Where the plaintiff was arrested on a judge's order, made on an affidavit, which stated that the deponent, the defendant's agent, had read and believed the truth of an affidavit made by C. in a former action, on which an order had been made to hold the plaintiff to bail in that action; it was held that there was reasonable and probable cause for the arrest, and that there was no duty on the defendants to make inquiry as to the truth of C.'s affidavit. *Gibson v. Veasey*, 15 L. T. 586, H. T. 1867, Ex.

The question was formerly whether the original plaintiff had a probable cause of action for the amount for which he held the party to bail, and not whether he had a probable cause of action in the particular form of action brought; thus, when A. had a good cause of action for a sum of 1,150*l.*

against B. & C. separately, but not jointly, and he sued B. & C. jointly, and arrested B. in that action for the amount, it was held that an action for a malicious arrest would not on that account lie at the suit of B. *Whalley v. Pepper*, 7 C. & P. 506. In an action for not accepting the debt and costs from a party in custody under a *ca. sa.*, the refusal of the plaintiff in the first action to sign a discharge to the sheriff on tender of the debt and costs, is *prima facie* evidence of malice. *Crozer v. Pilling*, 4 B. & C. 26.

As to malice and want of reasonable and probable cause, in presenting a petition to wind up a trading company under the Companies Acts, 1862, 1867, see *Quartz Hill, &c. Gold Mining Co. v. Eyre*, 11 Q. B. D. 674, Q. A. The questions for the jury are, whether the defendant *bonâ fide* believed in the state of facts he alleged, and whether he made reasonable and proper inquiry before adopting that belief. S. C., 50 L. T. 274, H. S. 1884, Q. B. D.

Damages.] In an action for malicious arrest the C. P. decided that the plaintiff was not entitled to recover more, on account of costs and expenses, than the taxed costs which he had incurred. *Sinclair v. Eldred*, 4 Taunt. 7; and see *Rogers v. Ilcombe*, 2 Esp. Dig. N. P. 38; *Jenkins v. Biddulph*, 4 Bing. 860; *accord. Webber v. Nicholas*, Ry. & M. 419, *cor. Best*, C.J. But *Id. Ellenborough* held that he might recover the amount of costs as between attorney and client. *Sandback v. Thomas*, 1 Stark. 306; *accord. Gould v. Barratt*, 2 M. & Rob. 171, *cor. Id. Abinger*. See *Jones v. Dyke*, Sugd. V. & P., 14th ed. 813; *Hodges v. Lichfield*, *El. of*, 1 N. C. 492; *Grace v. Morgan*, 2 N. C. 534; and the opinions expressed by the court in *Doe d. Drax v. Filliter*, 11 M. & W. 80, and *Howard v. Lovegrove*, L. R., 6 Ex. 43.

Statute of Limitations.] By the Limitation Act, 1623, 21 J. 1, c. 21, s. 3, the action must be brought within 6 years of the cause of action. In an action for maliciously opposing the plaintiff's discharge as an insolvent on a false affidavit, and causing his imprisonment, the Statute of Limitations ran from the time of opposition, though the imprisonment ordered by the judge continued to within 6 years. *Violett v. Sympson*, 8 E. & B. 344; 27 L. J., Q. B. 138.

ACTION FOR CONSPIRACY.

A conspiracy consists of a combination of two or more persons to do that which is contrary to law or to carry out an object not in itself unlawful by unlawful means. Where such conspiracy is to do that which is wrongful towards another person, and has occasioned him damage, he has at common law a right of action against the conspirators. *Quinn v. Leatham*, (1901) A. C. 495, D. P.; *S. Wales Miners' Federation v. Glamorgan Coal Co.*, (1905) A. C. 239, D. P. Thus a combination of two or more persons to induce A.'s customers or servants to break their contracts with him or not to deal with him or to continue in his employment, thereby causing him damage is actionable; unless there be justification or excuse for the combination. S.CC.

It is at common law no justification for a combination, formed by the officials of a miners' union to induce the miners to break their contracts, that its object is to raise the price of coal on which the rate of the miners' wages is calculated, without any malicious intent to injure their employer. *S. Wales Miners' Federation v. Glamorgan Coal Co.*, *supra*; nor, to prevent a workman from obtaining employment, in order to enforce the payment of

a debt due from him to the union. *Giblan v. National, &c. Union of Gt. Britain, &c.*, (1903) 2 K. B. 600, C. A. See also *Read v. Friendly Society of Operative Stonemasons, &c.*, (1902) 2 K. B. 732, C. A. Now, however, by the Trades Disputes Act, 1906, (6 E. 7, c. 47), s. 1, "An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute" (defined in sect. 5(3)) "not be actionable, unless the act if done without any such agreement or combination would be actionable."

"A body of traders whose motive object is to promote their own trade can combine to acquire, and thereby, in so far, to injure trade of competitors, provided they do no more than is incident to such motive object, and use no unlawful means." *Mogul SS. Co. v. McGregor Gow & Co.*, (1892) A. C. 25, 50, *per* Ld. Morris; see also *Id.* 35, 40, *per* Ld. Halsbury, C. In this case and *Quinn v. Leatham*, *ante*, p. 891, most of the earlier cases on the subject of civil remedy for conspiracy are collected. Where workmen have struck in breach of their contracts, those who help to maintain the strike by money and counsel, are not liable to the employer, merely because he thereby incurs loss. *Denaby, &c. Collieries v. Yorkshire Miners Assoc.*, (1906) A. C. 384, D. P. By stat. 6 E. 7, c. 45, s. 4 (1), "an action against a trade union whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union" (defined in sect. 5 (2)) "in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any Court." This section renders nugatory the decisions in *Tuff Vale Ry. Co. v. Amalgamated Soc. of Ry. Servants*, (1901) A. C. 426, D. P., and in other actions against trade unions cited above.

ACTION FOR WRONGFUL DISTRESS.

The cases on this subject have, for convenience of reference, been collected under the three heads of Excessive, Irregular, and Illegal Distress.

ACTION FOR EXCESSIVE DISTRESS.

The action for an excessive distress is founded on the statute of Marlbridge (52 H. 3), c. 4, which enacts that "distresses shall be reasonable and not too great; and he that taketh great and unreasonable distresses shall be grievously amerced for the excess of such distresses." An action for trespass or for conversion will not lie where rent is in fact due, 11 G. 2, c. 19, s. 19; cited *post*, p. 896. The statement of claim states the tenancy of the defendant at a certain rent; the rent claimed to be due; the taking a distress of goods of much greater value than the rent in arrear, and charges of the distress: and the damages.

The simple fact of making a distress, accompanied by an untrue claim of more rent than is due, and selling the goods under such claim, is not actionable, unless some special damage be proved, or unless it be shown that a larger quantity of goods has been sold than was sufficient to satisfy the rent actually in arrear; *Tuncred v. Leyland*, 16 Q. B. 669; even though the distress is alleged to have been made "maliciously," for an act which does not amount to a legal injury cannot be actionable because it is done with bad intent. *Stevenson v. Newnham*, 13 C. B. 285; 22 L. J., C. P. 110, Ex. Ch. These

cases overrule *Taylor v. Henniker*, 12 Ad. & E. 488; and in *Glynn v. Thomas*, 18 Exch. 870; 25 L. J., Ex. 125, where it appeared that the tenant, after the seizure of goods under an excessive claim, had discharged it without previously tendering what was really due, it was held that the detention if *bonâ fide* was lawful, and that there was no cause of action; and see *French v. Phillips*, 1 H. & N. 564; 26 L. J., Ex. 82; *Lucas v. Turlington*, 3 H. & N. 116; 27 L. J., Ex. 246. Where, however, a tender of the rent due has been made before impounding the distress, the court held that an action could be brought, *Crompton, J.*, saying that the case of *Glynn v. Thomas*, *supra*, had gone quite far enough. *Loring v. Warburton*, E. B. & E. 507; 28 L. J., Q. B. 31; and see *Crowder v. Self*, 2 M. & Rob. 190; *Chandler v. Doulton*, *post*, p. 895, and *Fell v. Whittaker*, L. R., 7 Q. B. 120.

By 3 & 4 W. 4, c. 27, s. 42, *ante*, p. 719, no more than 6 years' arrears of rent or interest in respect of any sum charged on or payable out of any land or rent, shall be recoverable by distress, whether the demise, &c., be by deed or parol. *Vide ante*, p. 722. In respect of any holding to which the Agricultural Holdings (England) Act, 1883, 46 & 47 V. c. 61, applies, as to which *vide infra*, the right of distress is (sect. 44), limited to rent, which became due not "more than one year before the making of such distress" provided that where by the course of dealing between the landlord and tenant, the payment of the rent has been allowed to be deferred, for one or two quarters after the due date, then the year shall run from such period, and not from the legal date of payment. A distress may be made for rent the payment of which has been so deferred, and also for rent, legally due, although the usual time for payment thereof, has not arrived, and the amounts together exceed a year's rent. *Ex pte. Bull*, 18 Q. B. D. 642. The act applies (sect. 61), to land held for a term of years, or for lives, or for lives and years, or from year to year; but does not (sect. 54), "apply to a holding that is not either wholly agricultural, or wholly pastoral, or in part agricultural, and as to the residue pastoral, or in whole or in part cultivated, as a market garden, or to any holding, let to the tenant, during his continuance in any office, appointment or employment, held under the landlord." By sect. 47, where compensation due under the act or any custom, or contract, has been ascertained before distress, the tenant may set off the amount against the rent due, and the distress is then limited to the balance.

[*Evidence of the tenancy and rent due.*] The usual allegation in the statement of claim is general, that the plaintiff held and enjoyed certain premises as tenant thereof to the defendant, which must be proved in the usual manner; that is, by production and proof of the lease or its counterpart or by the defendant's receipts for rent, of notices to quit, or other admissions by him of the terms: or by oral evidence of the contract when there is none in writing. These preliminary statements are, however, usually admitted by the broker's notice of distress or other proceedings. The tenancy must be proved as laid; and where the rent was stated to be due to A., and it appeared that the distress warrant was signed by A., as only agent to B., the real lessor, it was a fatal variance. *Ireland v. Johnson*, 1 N. C. 162. Such variances would now readily be amended. An action for an excessive distress, lies at the suit of a lodger against the landlord of the person under whom he occupies. *Fisher v. Algar*, 2 C. & P. 374.

[*Proof of the distress.*] The plaintiff must prove that his goods were distrained, but it is not necessary to prove that they were sold or taken away; the seizure as a distress is sufficient. *Baylis v. Usher*, 4 Moo. & P. 791; *Sells v. Hoare*, 8 B. Moore, 453. Where the landlord's agent went upon the tenant's premises, walked round them, gave a written notice that he had

distrained certain goods lying there for arrears of rent, and then went away without leaving any person in possession, it was held that this was a sufficient seizure to give the tenant a right of action for an excessive distress; for the statute 11 G. 2, c. 19, s. 10, *post*, p. 897, gives the landlord power to impound or secure on the premises, goods distrained for rent. *Suann v. Fulmouth*, *El. of*, 8 B. & C. 456. Where a landlord to whom rent is in arrears, refuses to allow goods to be taken away from the demised premises, this amounts to a distress, whether he actually seizes them or not. *Wood v. Nunn*, 5 Bing. 10; *Cramer v. Mott*, L. R., 5 Q. B. 357. So, where the broker demanded, and tenant paid the expenses of levy, under protest, and before any seizure or inventory made. *Hutchins v. Scott*, 2 M. & W. 809. As to what is an impounding, see *Action of replevin—Tender*, *post*, p. 1088.

The plaintiff need not show a legal or equitable title to the goods seized, a special property from the mere enjoyment of them will support the action. *Fell v. Whittaker*, L. R., 7 Q. B. 120.

The fact of the distress may be proved by calling the bailiff, broker, or other person who made the distress, who will also prove his authority from the defendant. If this evidence cannot be procured, the plaintiff should serve the defendant with notice to produce the warrant of distress, and give secondary evidence of it, or should connect the act of the bailiff with the defendant by some other evidence.

Proof of the excess.] When a landlord is about to make a distress, he is not bound to calculate very nicely the value of the property seized, but he must take care that some proportion is kept between that, and the sum for which he is entitled to take it. *Per* Bailey, J., *Willoughby v. Backhouse*, 2 B. & C. 823; *Field v. Mitchell*, 6 Esp. 71. A landlord is liable to damages in an action for an excessive distress, where the excess consist wholly of seizing growing crops, the probable produce of which is capable of being estimated at the time of the seizure; the measure of damages, is not, however, the value of the crops, but the inconvenience and expense which the tenant sustains in being deprived of the ownership and control of them, or to which he is put in procuring sureties to a larger amount than he would otherwise have been, on replevying the crops. *Piggott v. Birtles*, 1 M. & W. 441. See *Ridgway v. Stafford*, 6 Exch. 404. Where the defendant distrained goods worth 30*l.* or 40*l.* for the rent of 10*l.*, after a tender of the latter sum, the plaintiff was held entitled to waive the trespass and to sue for an excessive distress. *Branscombe, Ly. v. Bridges*, 3 Stark. 171; 1 B. & C. 145. In order to establish the excess, the plaintiff must be prepared with proof of the value of the goods seized. In an action for an excessive distress, the counsel for the plaintiff proposed to ask a witness what he thought might have been obtained for the goods distrained, from an incoming tenant in the same line of business as the plaintiff; but *per* Parke, B., "To determine whether the distress was excessive, you must ascertain what the goods seized would have sold for at a broker's sale." *Wells v. Moody*, 7 C. & P. 59. But, it has since been held that the question of excess is for the jury; *Smith v. Ashforth*, 29 L. J., Ex. 259; and the sale under the distress cannot be made the test of value, as, if so, probably no distress could be deemed excessive. *Id.* 260, *per* Martin, B. In this case the action was held maintainable, although the net proceeds of the sale did not amount to the rent due; there being strong evidence that the value of the goods seized was ten times the amount.

Damages.] In *Grace v. Morgan*, 2 N. C. 534, it was held that the plaintiff could not recover in this action the costs as between attorney and client, of a replevin suit (in respect of the same distress) of which he had received the

taxed costs. See, however, the cases, *ante*, p. 891. As to the measure of damages for excessive distress of growing crops, see *Piggott v. Birtles*, *ante*, p. 891. In *Chaudler v. Doulton*, 3 H. & C. 553; 34 L. J., Ex. 89, the defendant distrained goods in the plaintiff's mill of more than double the value of the rent due, and kept possession of them for five days. At the trial the plaintiff proved no actual damage. It was held that he was entitled at any rate to a verdict for nominal damages. Sale of the goods at an under-value cannot be shown unless alleged in the statement of claim. *Thompson v. Wood*, 4 Q. B. 493. It seems that the appraised value (*vide post*, p. 896), will be assumed to be the best value; *Waller v. Rumbal*, 1 Ld. Raym. 53; unless the contrary be shown, which may always be done. *Clarke v. Holford*, 2 Car. & K. 540. So the sale under the distress is not the test of value. *Smith v. Ashforth*, *ante*, p. 894. Where the plaintiff has no title, but is merely allowed to use the goods, the measure of damages is the sum he is obliged to pay in excess of the rent, *plus* any damage arising from the inconvenience of being deprived of the possession and enjoyment of the goods. *Fell v. Whittaker*, L. R., 7 Q. B. 120, 124.

Defence.

The defence of not guilty by stat. 11 G. 2, c. 19, ss. 19, 21, as to which *vide post*, p. 899, puts the plaintiff to the proof of the whole of his statement of claim when the action relates to any distress on premises chargeable with a rent to which the distrainor is entitled, and the defendant may show under it any defence. *Williams v. Jones*, 11 Ad. & E. 643. The defendant may give evidence that the distress was not excessive, or that the chattel distrained was entire, and that there was no other distress. *Field v. Mitchell*, 6 Esp. 71. Where the plaintiff had previously recovered in replevin for the same taking, such recovery was held to be a bar to this action in *Phillips v. Berryman*, 3 Doug. 286, but the contrary seems to be assumed in *Grace v. Morgan*, *ante*, p. 894. Where there has been an excessive distress, it is no defence that the plaintiff, after the distress authorized the defendant to sell, and gave him other powers with regard to the goods seized. *Willoughby v. Backhouse*, 2 B. & C. 821; *Sells v. Howe*, 8 B. Moore, 451; 1 Bing. 401. The defendant is not bound by his notice of distress, but may abandon it, and show that more rent was due than is there stated, subject to any special damage that may have thereby been caused to the plaintiff. *Gwinnet v. Phillips*, 3 T. R. 645; *Crowther v. Ramsbottom*, 7 T. R. 654. And in an action for excessive distress where the pleadings merely raised the question of the amount of rent due, it was held that the landlord might distrain for rent really due before a previous distress, although such previous distress purported to be for all rent due at that time, and though the second distress purported to be for rent due since the first. *Gambrell v. Falmouth, Ltd.*, 1 Ad. & E. 73. In this case the question did not arise as to whether the landlord could distrain twice for the same rent. *Vide post*, p. 900.

ACTION FOR IRREGULAR DISTRESS.

At common law, goods distrained for rent were merely a pledge, and could not be sold. But the stat. 2 W. & M. sess. 1, c. 5, gave the landlord the power of selling the goods, subject to the provisions of that Act, which must be strictly complied with. Sect. 1 (sect. 2, Ruff.), enacts "That were any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease, or contract whatsoever, and the tenant or owner of the goods so distrained shall not, within five days next after such distress taken, and notice thereof (with the cause of such taking), left at the chief mansion house

or other most notorious place on the premises charged with the rent distrained for, replevy the same, with sufficient security to be given to the sheriff according to law; that then in such case, after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall and may, *with the sheriff or under-sheriff of the county, or with the constable of the hundred, parish, or place, where such distress shall be taken (who are hereby required to be aiding and assisting therein),* cause the goods and chattels so distrained to be appraised by two sworn appraisers (*whom such sheriff, under-sheriff, or constable are hereby empowered to swear*) to appraise the same truly, according to the best of their understandings; and after such appraisement shall and may lawfully sell the goods and chattels so distrained for the best price can be gotten for the same towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement, and sale, *leaving the overplus (if any) in the hands of the said sheriff, under-sheriff, or constable, for the owner's use.*" By the Parish Constables Act, 1872 (35 & 36 V. c. 92), s. 13, so much of the above Act "as requires any sheriff, or under-sheriff, or constable to be aiding and assisting at any distress for rent, or to swear any appraiser thereat, shall be repealed, and no oath shall," . . . "be required from such appraiser." This statute, however, makes no provision as to any overplus arising from the sale: and it would seem that the landlord must now hold it for the use of the owner. *Vide post*, p. 898.

Under the Law of Distress Amendment Act, 1888 (51 & 52 V. c. 21) [which, by sect. 9, repeals the Agricultural Holdings (England) Act, 1883, (46 & 47 V. c. 61), ss. 49, 50], certain modifications are made in the provisions of stat. 2 W. & M. sess. 1, c. 5, *supra*. By sect. 5, appraisement of the goods is no longer required, unless required in writing by the tenant or owner of the goods, and, at the written request of the tenant, the goods distrained shall, for the purposes of sale, and at his cost, be removed to a public auction, or to some other proper place, specified in such request, and there sold; the expenses of appraisement, when required, and of removal, and any damage to the goods caused by the removal, shall be borne by the person requesting the same respectively. By sect. 6, the period of 5 days shall be extended for a period of not more than 15 days, if the tenant or owner of the goods make a request in writing in that behalf to the landlord, or other persons levying the distress, and also give security for any additional costs occasioned by such extension.

By sect. 8, the L. C. may make and alter rules (2) "for regulating the fees, charges, and expenses in and incidental to distresses; and (3) for carrying into effect the objects of this Act." Under this power the Distress for Rent Rules, 1888 (W. N., 1888, Pt. II., p. 439), amended by Rule of Dec. 7, 1888 (*Id.*, p. 563), have been issued. The table of fees, &c., is given in App. II. (*Id.*, p. 440). The bailiff, and not the landlord, is entitled to the percentage thereby allowed on levying a distress. *Phillips v. Rees*, 24 Q. B. D. 17, C. A. The landlord may agree to allow the bailiff extra remuneration. *Robson v. Biggar*, (1907) 1 K. B. 690.

If there were any irregularity in making or treating the distress, the landlord was, at common law, liable as a trespasser *ab initio*. *Gargrave v. Smith*, 1 Salk. 221; *Dye v. Leatherdale*, 3 Wils. 20; and see notes to *Six Carpenters' case*, 1 Smith's L. C., and *Action for illegal distress*, *post*, p. 899. The harshness of this rule has been altered in the case of a distress for rent due, by the Distress for Rent Act, 1737, 11 G. 2, c. 19, s. 19, which enacted that "Where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining, or by his, her, or their agents, the distress itself shall not be therefore deemed to be unlawful, nor the party or parties making it be deemed a trespasser or trespassers *ab*

initio; but the party or parties aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage, he, she or they shall have sustained thereby, and no more, in an action of trespass, or on the case at the election of the plaintiff or plaintiffs." The 17 G. 2, c. 38, s. 8, contains similar provisions with respect to a distress for poor-rate due, and the Summary Jurisdiction Act, 1879 (42 & 43 V. c. 49), s. 39 (4), with respect to a distress generally under a magistrate's warrant.

In consequence of this provision, trespass *qu. cl. fr.* or trover will not lie against the landlord for irregularities in making the distress, when any rent is in fact due, but the remedy is by a special action of trespass, or on the case, for the specific irregularity committed. *Wallace v. King*, 1 H. Bl. 13; *Messing v. Kemble*, 2 Camp. 115; *Winterbourne v. Morgan*, 11 East, 395. The section means that the plaintiff may sue in trespass or case according to the form which is applicable to the circumstances of the case; S. C., *Id.* 401, *per* Ld. Ellenborough; but this distinction is not now material. The plaintiff cannot, in general, recover in such action, without proof of special damage. *Rodgers v. Parker*, 18 C. B. 112; 25 L. J., C. P. 220; *Lucas v. Tarleton*, 3 H. & N. 120; 27 L. J., Ex. 246.

The most frequent actions for irregularity in making distresses will be found enumerated in Bullen and Leake's *Precedents of Pleadings*, Chap. III., tit. Distress; the pleadings will in each case indicate the evidence necessary to be adduced by the plaintiff at the trial; as to how the tenancy and distress are to be proved, *vide ante*, p. 893.

The notice required by the statute must be in writing. *Wilson v. Nightingale*, 8 Q. B. 1034. But it is sufficient if it be given personally to the distrainee. *Walter v. Rumbal*, 1 Ld. Raym. 53. It should mention the goods which are taken, and should state the amount of rent in arrear. *Kerby v. Harding*, 6 Exch. 234, 241; 20 L. J., Ex. 163, 166; *Wakeman v. Lindsey*, 14 Q. B. 625. The want of notice is, however, only an irregularity. *Trent v. Hunt*, 9 Exch. 14; 22 L. J., Ex. 318. A special action lies for selling within the five days. See *Wallace v. King*, 1 H. Bl. 13, and *Pitt v. Shew*, 4 B. & A. 206. But, not where the sale is void, as in the case of growing crops, not ripe, for the property does not pass to the purchaser, and the mere sale gives no right of action. *Owen v. Legh*, 3 B. & A. 470. The five days must be reckoned exclusively of the day of taking. *Robinson v. Waddington*, 13 Q. B. 753, overruling on this point *Wallace v. King*, *supra*. As to the liability of the superior landlord, to a lodger whose goods he has seized, for selling prematurely, see *Sharp v. Fowle*, *post*, p. 905. Neither the common law nor the stat. 2 W. & M. sess. i, c. 5, empowered the landlord to impound the goods on the premises; but, by the 11 Geo. 2, c. 19, s. 10, the distrainor may impound or otherwise secure the distress in such place or on such part of the premises, chargeable with the rent, as shall be most fit and convenient for the impounding and securing such distress, and may appraise, sell, and dispose of the same upon the premises, in like manner as he might do off the premises. The distrainor ought to put the goods distrained all in one room, and keep possession of that only, and not intrude into the other part of the house, or he should remove the goods out of the house; *Washburn v. Black*, 11 Exch. 405, n.; but very slight evidence that the distrainee consented to the goods being left as they were previously, will suffice. S. C. The distrainor ought not, it would seem, to lock up the premises, so as entirely to exclude the tenant; *Smith v. Ashforth*, 29 L. J., Ex. 259; unless that course is necessary in order to secure the distress. *Cox v. Painter*, 7 C. & P. 767; see also *Hoods v. Durrant*, 16 M. & W. 149. See further as to what constitutes an impounding, *sub tit. Replevin—Tender*, *post*, p. 1088. The distrainor is bound, at his peril, to take care that the

pound or place in which he impounds the distress, is in a fit and proper state, and he is liable for the consequences if it be not. *Wilder v. Speer*, 8 Ad. & E. 547; *Bignell v. Clarke*, 5 H. & N. 485; 29 L. J., Ex. 257.

Trespass lies if the landlord suffer the goods to remain on the premises an unreasonable time after the five days. *Griffin v. Scott*, 2 Ld. Raym. 1424; *Winterbourne v. Morgan*, ante, p. 897; see also *Cox v. Painter*, ante, p. 897. But the landlord may remain more than five days on the premises, for the purpose of selling the goods distrained, for he cannot sell till five days have expired, and it must be left to the jury to say what is a reasonable time, after that period, within which to sell the goods. *Pitt v. Shew*, ante, p. 897. The same principles apply when the five days have been extended under 51 & 52 V. c. 21, s. 6, ante, p. 896. Where an appraisement is required, there should be two appraisers: *Allen v. Flicker*, 10 Ad. & E. 640; reasonably competent, but not necessarily professional appraisers. *Roden v. Eyclon*, 6 C. B. 427. Neither of them must have made the distress. See *Westwood v. Cowne*, 1 Stark. 172; and *Lyon v. Weldon*, 2 Bing. 336, per Best, C. J.

The statute only authorizes a sale, therefore the landlord cannot take the goods at the appraised valuation, *King v. England*, 4 B. & S. 782; 33 L. J., Q. B. 145; nor can he purchase the goods himself at the auction; *Moore Nettlefold & Co. v. Singer, & Co.*, (1904) 1 K. B. 820, C. A., in neither case does the property in the goods pass to him. The landlord must sell at the best price, and cannot stipulate for consumption of hay, &c., on the premises in accordance with a covenant in the lease. *Hawkins v. Walrond*, 1 C. P. D. 280. The stat. 56 G. 3, c. 50, s. 11, prohibiting the removal by a purchaser of any crops, manure, &c., from a farm which the tenant ought not to have removed, does not apply to the sale by a landlord of a distress. S. C. Formerly, if the landlord did not leave the overplus in the hands of the sheriff, money had and received would not lie against him; the proper remedy was by a special action on the statute. *Yates v. Eastwood*, 6 Exch. 805; 20 L. J., Ex. 303; *Evans v. Wright*, 2 H. & N. 527; 27 L. J., Ex. 50. As, however, the sheriff does not now take part in a distress (*vide ante*, p. 896), it would seem that money had and received against the landlord, for the overplus is the proper remedy. In such action the plaintiff may dispute the reasonableness of the charges for making the distress. *Lyon v. Tomkins*, 1 M. & W. 603. Where the rent distrained for does not exceed 20l., these charges were limited by 57 G. 3, c. 93, s. 1, to the amount set out in the schedule to the act, and no charge is allowed to be made for any act unless such act shall have really been done. Thus the charge of 2s. 6d. a day for man in possession can only be made when he is in real possession, unless the distraintee agrees to pay the charge. *Lumsden v. Burnett*, (1898) 2 Q. B. 177. C. A. See also *Ex pte. Arnison*, L. R., 3 Ex. 56. It seems that if the distress is made for more than 20l., though the distress sell for less than 20l., it is not within the provision. *Child v. Chamberlain*, 5 B. & Ad. 1049. The act is in force, but the scale of charges is now fixed by the Distress for Rent Rules, 1888, App. II., Scale II.; W. N. 1888, Pt. II. 440, *vide ante*, p. 896. It still applies to a distress for poor rates. *Coster v. Headland*, (1906) A. C. 286, D. P. See also *Scott v. Denton*, (1907) 1 K. B. 456. And the action will lie for repayment of so much of the charge for a distress to recover an amount not exceeding 20l., as is unreasonable. *Ex pte. Edwards*, (1905) 2 K. B. 108.

Damages.] In an action for selling goods, distrained for rent, without appraisement where appraisement is required (*vide ante*, p. 896), the measure of damages is the real value of the goods sold, *minus* the rent

due; for the distress is lawful, but the sale without appraisement is not so, and the plaintiff retains, notwithstanding the sale, the same interest in the goods which he had while they were in the landlord's hands before the sale, viz., to the amount of the real value of the goods, subject to the landlord's right for the rent due. *Knight v. Egerton*, 7 Exch. 497, 408, *per* Parke, B., referring to *Biggins v. Goode*, 2 C. & J. 364; *Whitworth v. Maden*, 2 Car. & K. 517, *per* Wightman, J. See further, *ante*, p. 895.

Defence.

The defence of not guilty (by stat. 11 G. 2, c. 19, ss. 19, 21) seems not to be affected by the stat. 56 & 57 V. c. 61, *post*, p. 1131, where the action is against a person other than a public authority; see cases thereon, *post*, p. 1132. If this construction of the act be correct this defence puts the plaintiff to prove the whole of his statement of claim, and lets in any defence the defendant may have. *Williams v. Jones*, 11 Ad. & E. 643. See *Eugleton v. Gutteridge*, 11 M. & W. 465: for Rules, 1883, O. xix., r. 12, *ante*, p. 309, reserves the right to plead this defence, and provides that it shall have the same effect as heretofore. As to how it is to be pleaded, see O. xxi., r. 19, *ante*, p. 310. If on the other hand the action be within 56 & 57 V. c. 61, this defence is inadmissible, and the defendant must plead his defences specially; in this case *Id.* s. 1 (*c. d.*), introduces special provisions as to tender of amends, and sect. 1 (*a*) fixes six months as the period of limitation, *post*, p. 1132.

As to the liability of the landlord, and of his agent, who signed the distress warrant, for the wrongful acts of the bailiff employed to distrain, *vide post*, pp. 908, 909.

By 11 G. 2, c. 19, s. 20, it is provided that the tenant shall not recover for any unlawful act or irregularity, if tender of amends have been made by the party distraining, before action brought.

ACTION FOR ILLEGAL DISTRESS.

Where a distress is made by a stranger, or by a person who has no right to distrain (as to which *vide Replevin—Tenancy of plaintiff*, *post*, pp. 1082 *et seq.*), an action of trespass, or for conversion will lie.

So again, where a distress is made by a landlord, no rent being due, or after a tender of the rent, or after a former distress, or if the distress be illegal owing to the time, place, or manner of making it, or from the nature of the goods taken, the proceeding is illegal *ab initio*, and an action of trespass and for conversion, or of replevin may be maintained. The cases of illegal distresses by landlords will be found below, classed under the heads above enumerated; but many of the cases bearing on the subject will be found *sub tit. Replevin*, *post*, pp. 1079 *et seq.*

As to illegal distresses for damage feasant, *vide Replevin—Avowry for damage feasant*, *post*, pp. 1087, 1088.

[*No rent due.*] The stat. 2 W. & M. sess. 1, c. 5, s. 4 (s. 5, Ruf.), enacts that where a landlord distrains and sells when no rent is due, the plaintiff shall, by action of trespass, or on the case, recover double the value of the goods distrained. As to payment, and statutory and other satisfaction of rent, *vide ante*, pp. 343, 730, and *sub tit. Replevin—Denial of rent being in arrear*, *post*, p. 1086. The action may be one of trespass or for conversion, just as if the distress were by a mere stranger; or the tenant may bring a special action on the case founded on the statute. As to how the tenancy and the distress are to be proved, *vide ante*, pp. 893, 894.

After tender of the rent.] A tender before distress makes the taking unlawful; after distress and before impounding it makes the detention unlawful. *Six Carpenters' case*, 8 Rep. 147 a; *Gulliver v. Cosens*, 1 C. B. 788; *Loring v. Warburton*, E. B. & E. 507; 28 L. J., Q. B. 31. In the former case, trespass *qu. cl. fr.*, and in the latter, detainee is the proper remedy. *Gulliver v. Cosens*, *supra*; *Singleton v. Williamson*, 7 H. & N. 750; 28 L. J., Ex. 289. Where a tender of the rent is made after distress, but before impounding, the tenant may maintain trespass *qu. cl. fr.* for a subsequent removal of the distress. *Vertue v. Beasley*, 1 M. & Rob. 21. It was said by Ld. Denman, C.J., in *Ladd v. Thomas*, 12 Ad. & E. 117, 127, that trespass might be maintained for wrongfully maintaining possession of the distress; but it has since been held that a landlord, who, after the impounding, accepted the rent and expenses, could not be treated as a trespasser, merely because he retained possession of the goods distrained, although his refusal to deliver possession of the goods might render him liable in trover. *West v. Nibbs*, 4 C. B. 172; *accord. per Parke, J.*, in *Vertue v. Beasley*, 1 M. & Rob. 21, 22. In the case of a distress of growing crops a tender may be made any time before they are ripe. *Owen v. Legh*, 3 B. & A. 470, *per Abbott, C.J.* Tender after impounding is too late. *Six Carpenters' case*, *Ladd v. Thomas*, *Singleton v. Williamson*, *supra*. See further, *sub tit. Replevin—Tender*, *post*, pp. 1088, 1089.

After a former distress for the same rent.] A second distress for rent for which the landlord has already distrained is unlawful, if the first was abandoned voluntarily, or might have been sufficient to satisfy the rent, but for the landlord's default in not taking enough. *Anon.*, Cro. Eliz. 13; *Dawson v. Cropp*, 1 C. B. 961; *Bagge v. Mawby*, 8 Exch. 641; 22 L. J., Ex. 236. "If there has been some mistake as to the value of the goods, and the landlord fairly supposed the distress to be of the proper value at the time of levying the first distress, and he afterwards finds it to be insufficient, he may then distrain for the remainder; or if the tenant has done anything equivalent to saying 'forbear to distrain now, and postpone your distress to some other time.' In such cases the landlord may distrain a second time. But, if there is fair opportunity and there is no lawful or legal cause why he should not work out the payment of the rent, by reason of the first distress, his duty is to work it out by the first distress and he cannot distrain again." *Bagge v. Mawby*, 8 Exch. 641, 649; 22 L. J., Ex. 236, 238, *per Parke, B.* Where the tenant by his misconduct prevents the first distress being realized, a second is lawful. *Lee v. Cooke*, 2 H. & N. 584; 3 H. & N. 203; 27 L. J., Ex. 337, Ex. Ch. So where the landlord has withdrawn, in pursuance of an agreement with the tenant to pay the rent by instalments, the landlord may distrain again, on the failure of the tenant to pay the instalments. *Thwaites v. Wilding*, 12 Q. B. D. 4, C. A. Where a distress is void owing to the illegal manner of the bailiff's entry (*vide post*, p. 902), and after seizure is not carried out, the landlord may put in a fresh distress for the same rent by a fresh warrant to another bailiff. *Grunnell v. Welch*, (1905) 2 K. B. 650; (1906) 2 K. B. 555, C. A.

A person entitled to distrain for an entire demand cannot split it. *Wallis v. Savill*, 2 Lutw. 1532; *Hutchins v. Chambers*, 1 Burr. 579, 589; *Owens v. Wynne*, 4 E. & B. 579.

The action for an illegal second distress is usually in the form of a special action on the case, but there seems no reason why an action of trespass or for conversion should not equally lie. As to what evidence of the tenancy and distress is admissible, *vide ante*, pp. 893, 894. Where the

action is for an excessive distress, the plaintiff cannot rely on a prior distress having been made for the same rent, where this ground of action does not appear on the record. *Gambrell v. Falmouth, Id., ante*, p. 895.

Illegality by reason of bailiff being uncertified.] By the Law of Distress Amendment Act, 1888 (51 & 52 V. c. 21), s. 7, "no person shall act as a bailiff to levy any distress for rent unless he shall be authorized to act as a bailiff, by a certificate in writing under the hand of a county court judge," which may be either general or special. *Vide infra*.

"If any person not holding a certificate under this section shall levy a distress contrary to the provisions of this act, the person so levying, and any person who has authorized him so to levy, shall be deemed to have committed a trespass."

By the Distress for Rent Rules, 1888, rr. 1—4 (W. N., 1888, Pt. II., p. 339), a general certificate can be granted by the judge only. It authorizes the bailiff named in it to levy at any place in England or Wales. A special certificate, which can be granted by the judge or registrar, specifies the particular distress or distresses to which it applies. Forms of the certificates are given in App. I.

A distress levied by the landlord himself, or, *ut semble*, by any person having a statutory authority to distrain, is not affected by sect. 7. *Hogarth v. Jennings*, (1892) 1 Q. B. 907, C. A. *Secus*, where levied by the managing director of a company which is the landlord. S. C. The landlord who has authorized a distress by an uncertificated bailiff B., is liable to a third person P., for the seizure by B. of P.'s goods on the premises. *Perring v. Emerson*, (1906) 1 K. B. 1.

Illegality owing to the time of making distress.] A distress, except for damage feasant, must be made between sunrise and sunset. Co. Litt. 142 a; *Aldenburgh v. Peaple*, 6 C. & P. 212. It will be illegal if made at any other time, even though there be light. *Tutton v. Darke*, and *Nixon v. Freeman*, 5 H. & N. 647; 29 L. J., Ex. 271. It would seem that *apparent* sunrise and sunset is what is meant, as the rule was established before the invention of clocks. See S. C., 29 L. J., Ex. 272, *per* Pollock, C.B. For trespass damage feasant, a distress may be taken in the night. Co. Litt. 142 a. At common law a distress could not be made after the expiration of the tenancy, and hence the last instalment of rent could never be distrained for. Co. Litt. 47 b. This is remedied by stat. 8 A. c. 18 (c. 14, Ruff.), ss. 6, 7, which allows a landlord to distrain within six calendar months after the determination of the tenancy, provided his reversion remain, and it be during the possession of the tenant from whom the rent became due; and the power is extended by 3 & 4 W. 4, c. 42, s. 38, to the executors of a deceased landlord, in respect of arrears of rent due in his lifetime. For the cases decided on these sections, see *sub tit. Replevin—Avoirry for distress after the end of lease, post*, p. 1081.

Illegality owing to the place of making distress.] As a general rule a distress can only, except in the case of the Crown, be taken on the demised premises. *Capel v. Buzzard*, 5 Bing. 150, Ex. Ch.; Co. Litt. 161 a; Com. Dig. Distress (A. 3), (B. 1). The stat. of Marlbridge (52 H. 3), c. 15, enacted that no one, save the king, should distrain out of his fee, nor in the king's highway, nor in the common street; and this was in affirmance of the common law. 2 Inst. 131. But, if the landlord come to take a distress, and see the tenant's cattle on the land, and then the tenant drive them off the land to avoid distress, the landlord may follow them; but he cannot do so if he had not seen the cattle, or if the tenant drove them off for any other purpose. Co. Litt. 161 a.

Where goods are standing on the part of a highway which adjoins the demised premises, and is included in the demise (*vide post*, p. 932), they may be distrained there. *Hodges v. Lawrence*, 18 J. P. 347, H. T. 1854, Ex., cited in *Gillingham v. Gwyer*, 16 L. T., 640, T. T. 1867, *cor.* Lush, J. But it would be otherwise if the goods were merely passing over that part of the highway.

The stat. 11 G. 2, c. 19, ss. 1—7, contains provisions allowing a landlord, within thirty days and under certain conditions, to follow goods fraudulently removed from the premises to avoid a distress, and to break into barns, houses, &c., to recover the same; the provisions of this act and the cases decided thereon will be found *sub tit. Replevin—Aзовry for distress on goods fraudulently removed*, *post*, p. 1081. The defence must be specially pleaded. See *Defence*, *post*, p. 908.

By the stat. 11 G. 2, c. 19, s. 8, landlords or their agents may “take and seize, as a distress for arrears of rent, any cattle or stock of their respective tenant or tenants feeding or depasturing upon any common appendant or appurtenant, or any ways belonging to all or any part of the premises demised or holden.”

Illegality from the manner of entering to make distress.] The landlord must enter the premises for the purpose of distraining in the usual manner adopted by persons having access to the building, as by turning the key, lifting the latch, or drawing back the bolt. *Ryan v. Shilcock*, 7 Exch. 72; 21 L. J., Ex. 55. If he break open the outer door or gate; *Brown v. Glenn*, 16 Q. B. 254; 20 L. J., Q. B. 205; *Attack v. Bramwell*, 3 B. & S. 520; 32 L. J., Q. B. 146; *Grunnell v. Welch*, *ante*, p. 900; or, if he open a closed window, whether fastened or not, and enter thereby; *Hancock v. Austin*, 14 C. B., N. S. 634; 32 L. J., C. P. 252; *Nash v. Lucas*, L. R., 2 Q. B. 590; he becomes a trespasser *ab initio*. But, where a window is open, entry for distress may be made by further opening it. *Crabtree v. Robinson*, 15 Q. B. D. 312. See further Roll. Abr. tit. Distress (M.) 7, and *Id.* pl. 2, cited 2 Wms. Saund. 284 c. (2). Access to an open door or window may be obtained by climbing over a fence or wall. *Eldridge v. Stacey*, 15 C. B., N. S. 458; *Long v. Clarke*, (1894) 1 Q. B. 119, C. A. These principles apply equally to any building. *Brown v. Glenn*, *supra*; *American Concentrated Must Co. v. Hendry*, 62 L. J., Q. B. 388, C. A.

As to forcible entry upon premises to which goods have been fraudulently removed, see stat. 11 G. 2, c. 19, *supra*, and *post*, p. 1081.

Where a broker is in possession of goods as a distress for rent, and he has by force or fraud been expelled from the premises, he may, provided there has been no abandonment of the distress, forcibly regain possession of the goods, and for this purpose break open the outer door of the premises. *Eagleton v. Gutteridge*, 11 M. & W. 465. So where he has voluntarily left the premises, intending to return, for, after impounding, the goods are in *custodiâ legis*. *Bannister v. Hyde*, 2 E. & E. 627; 29 L. J., Q. B. 141; *Jones v. Biernstein*, (1900) 1 Q. B. 100, C. A.; *Eldridge v. Stacey*, *supra*. This defence is admissible under the plea of not guilty by statute. *Eagleton v. Gutteridge*, *supra*. Whether the distress has been abandoned is a question of fact. *Eldridge v. Stacey*, *supra*; and the jury may negative abandonment although the broker was expelled and did not return for three weeks. S. C. But, there must have been peaceable possession, previously obtained, to enable the broker to re-enter by force; merely putting the foot between the door and lintel is not a sufficient possession. *Boyd v. Profaze*, 16 L. T., 432, Mellor, J.

If the distress have been abandoned, the property revests in the owner and the landlord's power over it is then gone. See *Swann v. Falmouth*, *El. of*, 8 B. & C. 456.

Illegality from nature of goods taken—Goods privileged from distress.] There are certain goods which are privileged from distress, and a landlord who enters and distrains those goods, makes himself a trespasser *ab initio*. But where some only of the goods he takes are privileged, he becomes a trespasser *ab initio quâ* those goods only. *Harvey v. Pocock*, 11 M. & W. 740.

The goods which are privileged from distress are enumerated in the judgment in *Simpson v. Hartopp*, Willes, 512, and in the notes thereto in 1 Smith's L. C., and are there arranged under the following heads:—

1. Things annexed to the freehold. Fixtures are not distrainable even though they could have been removed by the tenant during the term. *Darby v. Harris*, 1 Q. B. 895. The question as to whether a fixed machine is distrainable depends chiefly on two considerations: 1st, the mode of annexation to the soil or building, whether it can be easily removed *integre, salve, et commode*, or not without injury to itself or the building; and 2ndly, the object of such annexation, whether it was so annexed for the permanent improvement of the building (*pur un profit del inheritance*), or merely for a temporary purpose, or the more complete enjoyment and use of it, as a chattel. *Hellawell v. Eastwood*, 6 Exch. 295, 312; 20 L. J., Ex. 154, 160, *per Parke, B.* The law so stated is correct, provided the words "merely for a temporary purpose," are understood to apply to such cases as a "carpet tacked to the floor for the purpose of keeping it stretched, whilst it was there used, and not to a case such as that of a tenant, who, *e.g.*, fixes a shop counter for the purpose (in one sense temporary) of more effectually enjoying the shop, while he continues to sell his wares there;" but it is doubtful if the law was, in the last-cited case, correctly applied to the facts. *Holland v. Hodgson*, L. R., 7 C. P. 328, 337, Ex. Ch. *per cur.* A temporary tramway is not distrainable. *Turner v. Cameron*, L. R., 5 Q. B. 306. Where the landlord severs fixtures for a distress, the tenant may bring trover for them. *Dalton v. Whitthem*, 3 Q. B. 961. But the mere inclusion of fixtures in a notice of distress, without seizure or severance is not actionable. *Beck v. Denbigh*, 29 L. J., C. P. 273.

2. Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ. *Gisbourne v. Hurst*, 1 Salk. 249. Thus, materials sent to be made into cloth, or cloth sent to a tailor to be made into a coat, or a horse sent to a farrier to be shod, or a horse at an inn or corn sent to a miller to be ground, are privileged. Co. Litt. 47 a; *Read v. Burley*, Cro. Eliz. 596; *Gibson v. Ireson*, 3 Q. B. 39. So, goods delivered, in the ordinary course of business, to a carrier to be carried; *Gisbourne v. Hurst*, *supra*; or, to an auctioneer for sale. *Adams v. Grane*, 1 Cr. & M. 380; *Williams v. Holmes*, 8 Exch. 861; 22 L. J., Ex. 283; *Brown v. Arundell*, 10 C. B. 54; 20 L. J., C. P. 30. But only while on premises occupied by him. *Lyons v. Elliott*, 1 Q. B. D. 210. So goods delivered to a factor or commission agent for sale, whether the goods are in his own warehouses or premises; *Gilman v. Elton*, 3 B. & B. 75; *Findon v. McLaren*, 6 Q. B. 891; or, are deposited by him in the warehouse of a granary keeper or wharfinger, in the ordinary course of business; *Thompson v. Mashiter*, 1 Bing. 283; *Matthias v. Mesnard*, 2 C. & P. 352, Best, C.J.; are privileged from seizure as a distress for the rent of the respective premises, where they are deposited by the persons in whose custody they are. So, goods delivered in pledge to a pawnbroker; *Swire v. Leach*, 18 C. B., N. S. 479; 34 L. J., C. P. 150; or, furniture deposited at a depository warehouse to be taken care of; *Miles v. Furber*, L. R., 8 Q. B. 77; are privileged. But, horses and carriages standing at livery are not so privileged. *Parsons v. Gingell*, 4 C. B. 545. This case is, however, inconsistent with *Swire v. Leach*, *supra*, see L. R., 8 Q. B. 82, *per*

Cockburn, C.J. The things must have been delivered or sent by their owner. *Clarke v. Millwall Dock Co.*, 17 Q. B. D. 494, C. A. By stat. 6 & 7 Vict. c. 40, s. 18, looms, materials, tools, &c., intrusted in order to be used or worked in the woollen, linen, cotton, silk, &c., manufactures, cannot be seized for rent, unless due from the owner of them. Gas meters and fittings for gas, including gas stoves, let by a gas company, are privileged in those cases in which the Gasworks Clauses Act, 1847 (10 & 11 V. c. 15), s. 14, is still in force. *Gaslight and Coke Co. v. Hardy*, 17 Q. B. D. 619, C. A.

By the Railway Rolling Stock Protection Act, 1872 (35 & 36 V. c. 50), ss. 3, 5, rolling stock in a work is not liable to a distress for rent payable by the tenant of the work, to an extent beyond the interest of the tenant therein, if the actual owner is sufficiently indicated by a distinguishing mark on the stock. By sect. 2, “‘rolling stock’ includes waggons, trucks, carriages of all kinds, and locomotive engines used on railways; ‘rent’ includes royalty, or other reservation in the nature of rent; ‘work’ includes any colliery, quarry, mine, manufactory, warehouse, wharf, pier, or jetty, in or on which is any railway siding.”

By the Agricultural Holdings (England) Act, 1883, 46 & 47 V. c. 61, in the case of tenancies to which the Act applies, *vide* sects. 54, 61, *ante*, p. 893, sect. 45, provides that “‘agricultural or other machinery, which is the *bonâ fide* property of a person, other than the tenant, and is on the premises of the tenant, under a *bonâ fide* agreement, with him, for the hire or use thereof, in the conduct of his business, and live stock of all kinds, which is the *bonâ fide* property of a person, other than the tenant, and is on the premises of the tenant, solely for breeding purposes, shall not be distrained for rent in arrear.”

Somewhat analogous to this class of cases is the protection given by the Lodgers’ Goods Protection Act, 1871, 34 & 35 V. c. 79, to the goods of lodgers against distress by a superior landlord:—

By sect. 1, if any superior landlord shall levy, or authorize to be levied, a distress on any furniture, goods, or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff, or other person employed by him to levy such distress, with a declaration in writing made by such lodger, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, &c., so distrained or threatened to be distrained upon, and that such furniture, &c., are the property or in the lawful possession of such lodger; and also setting forth whether any and what rent is due and for what period from such lodger to his immediate landlord; and such lodger may pay to the superior landlord, &c., the rent, if any, so due as last aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord. And to such declaration shall be annexed a correct inventory, subscribed by the lodger, of the furniture, &c., referred to in the declaration.

By sect. 2, if any superior landlord, or any bailiff, or other person employed by him, shall, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, &c., the rent, if any, which by the last preceding section such lodger is authorized to pay, shall levy or proceed with a distress on the furniture, goods, or chattels of the lodger, such superior landlord, &c., shall be deemed guilty of an illegal distress, and the lodger may apply to a justice of the peace for an order for the restoration to him of such goods; . . . and the superior landlord shall also be liable to an action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be inquired into.

By sect. 3, any payment made by any lodger pursuant to sect. 1, shall be

deemed a valid payment on account of any rent due from him to his immediate landlord.

This act, it is to be observed, applies to a lodger only, and not to an under-tenant; and as the act contains no definition of lodger, the question, as to whether a person is an under-tenant or lodger, is one of considerable difficulty. This question is one of fact; *Ness v. Stephenson*, 9 Q. B. D. 245; but the judge must explain to the jury, the requisite conditions for the existence of the relation of landlord and lodger. *Morton v. Palmer*, 51 L. J., Q. B. 7, C. A. In order that a person, occupying part of a house, should be a lodger, the landlord must retain such control and dominion over the house, as is usually, in this country, retained by landlords letting lodgings; S. C.; but the landlord need not reside in the house; S. C.; *Ness v. Stephenson*, *supra*, and the lodger may have the right of exclusive occupation of the greater part of the house, and uncontrolled right of ingress and egress. S. C.; *Phillips v. Henson*, 3 C. P. D. 26. A person cannot at the same time be both under-tenant and lodger in respect of the same premises. *Bradley v. Baylis*, 8 Q. B. D. 231, *per* Brett, L. J.; *Campbell v. Chambers* (*Simpson's case*), 20 L. R., Ir. 231, see further *post*, p. 928. In order that a person should be a lodger, within the act, he must sleep on the premises. *Heawood v. Bone*, 13 Q. B. D. 179. The question of lodger, or under-tenant, has been much discussed in the following appeals from the decisions of revising barristers: *Bradley v. Baylis*, *Morfee v. Novis*, *Kirby v. Biffen*, 8 Q. B. D. 195, C. A.; *Aneketill v. Baylis*, 10 Q. B. D. 577, C. A.; *Kent v. Pittall*, (1906) 1 K. B. 60, C. A.; *Douglas v. Smith*, (1907) 1 K. B. 126; affirmed, 23 T. L. R. 612, C. A.

The lodger's declaration is a protection against the particular distress only, in respect of which it was given. *Thwaites v. Wilding*, 11 Q. B. D. 421; 12 Q. B. D. 4, C. A. It need not state that the declarant is a lodger, nor that no rent is due to his immediate landlord, if none is in fact due. *Ex pte. Harris*, 16 Q. B. D. 130, C. A. The inventory is sufficiently subscribed by the lodger where the declaration signed by him refers to a list of articles annexed, as being a correct inventory, which list was written on a subsequent part of the same paper, but not otherwise signed by him. *Godlonton v. Fulham, &c. Property Co.*, (1905) 1 K. B. 431. The bailiff who has levied a distress made illegal by sect. 2, is liable to an action; *Lowe v. Dorling*, (1906) 2 K. B. 772, C. A., *diss.* Collins, M.R.; and *semble* the landlord is also liable even although he had not authorized the seizure of the lodger's goods. S. C., (1905) 2 K. B. 501. The superior landlord is liable to the lodger A., if he sell A.'s goods before the expiration of the five clear days, required by 2 W. & M. sess. 1, c. 5, s. 1, *ante*, p. 896, so that A. is deprived of the opportunity of serving his notice. *Sharpe v. Fowle*, 12 Q. B. D. 385. The act seems not to protect a lodger's goods from a distress by the grantee of a rent-charge.

3. Cocks or sheaves of corn, and other things which cannot be restored in the same plight. Butcher's meat falls within the exception. *Morley v. Pincombe*, 2 Exch. 101. The rule has, however, been altered by 2 W. & M. sess. 1, c. 5, s. 2 (s. 3, Ruff.), which gives the right to distrain "sheaves or cocks of corn, or corn loose or in the straw, or hay;" and by 11 G. 2, c. 19, s. 8, which allows distresses of "all sorts of corn and grass, hops, roots, fruits, pulse, or other product whatsoever," growing on the land demised. The words "other product" in the latter act are confined to products of a nature similar to those specified in the section, to all of which the process of becoming ripe, and of being cut, and gathered, made, and laid up when ripe, are incidental. *Clark v. Gaskarth*, 8 Taunt. 431; 2 B. Moore, 491. Thus, the section does not include trees and shrubs growing in a nursery ground. S. C. But this provision, unlike the former one (*Johnson v. Faulkner*, 2 Q. B. 925), applies only to distresses made by landlord, and not by grantee of a rent-charge. *Miller v. Green*, 2 C. & J. 142, Ex. Ch. If growing

crops are seized and sold before they are ripe the sale is wholly void. *Owen v. Leigh*, 3 B. & A. 470, cited *ante*, p. 897. But, where they were sold before they were cut, and were cut immediately afterwards, it was held to be a mere irregularity, and that no action lay without proof of special damage. *Rodgers v. Parker*, 18 C. B. 112; 25 L. J., C. P. 220. In *Proudlove v. Twemlow*, 1 Cr. & M. 326, where the facts much resembled those in *Rodgers v. Parker*, *supra*, the plaintiff obtained nominal damages; but this arose from the form of the rule argued, it being one to reduce the damages merely. *Per Jervis, C. J.*, in *Rodgers v. Parker*, *supra*.

4. Things in actual use. The tools a man is using, or the horse he is riding, cannot be distrained, on account of the great danger that a breach of the peace would be committed if these goods were seized. *Read v. Burley*, *Simpson v. Hartopp*, *ante*, p. 903; Co. Litt. 47 a. The same rule applies to distress for trespass *damage feasant*. *Field v. Adams*, 12 Ad. & E. 649.

By the Law of Distress Amendment Act, 1888 (51 & 52 V. c. 21), s. 4, "The following goods and chattels shall be exempt from distress for rent, namely, any goods or chattels of the tenant or his family which would be protected from seizure in execution under section 96 of the County Courts Act, 1846, or any enactment amending or substituted for the same." (*Vide infra*.) "Provided that this enactment shall not extend to any case where the lease, term, or interest of the tenant has expired, and where possession of the premises in respect of which the rent is claimed has been demanded, and where the distress is made not earlier than seven days after such demand."

The County Courts Act, 1888 (51 & 52 V. c. 43), s. 147, which has replaced the County Courts Act, 1846, s. 96, by identical words protects from seizure "the wearing apparel and bedding" of the person against whose goods the execution has issued, "or his family, and the tools and implements of his trade, to the value of 5*l*." "Bedding" here includes bedstead. *Davis v. Harris*, (1900) 1 Q. B. 729. Where the only chattel on the premises is an implement of the tenant's trade, *e.g.* a cab, it is protected, although its value exceeds 5*l*. *Lovell v. Richinga*, (1906) 1 K. B. 480.

5. Animals *feræ nature* are privileged; Co. Litt. 47 a; and so, it is there said, are dogs; but this is doubtful, see 1 Smith's L. C. 11th ed. 446-8.

6. Goods in the custody of the law, *e.g.*, goods distrained *damage feasant* or taken in execution. Co. Litt. 47 a; *Peacock v. Purvis*, 2 B. & B. 362; *Wright v. Dewes*, 1 Ad. & E. 641. But now by 14 & 15 V. c. 25, s. 2, growing crops seized and sold under an execution may, while remaining on the premises, be distrained for rent accruing due after seizure and sale, if there be no other sufficient distress on the premises. Goods in the possession of a bankruptcy messenger are not privileged. *Briggs v. Sowry*, 8 M. & W. 729. But the Bankruptcy Act, 1883 (46 & 47 V. c. 52), s. 42 (1), amended by *Id.* 1890, 53 & 54 V. c. 71, s. 28, provides that "the landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that if such distress for rent be levied after the commencement of the bankruptcy, it shall be available only for *six months'* rent accrued due prior to the date of the order of adjudication, but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the surplus due for which the distress may not have been available;" (2) for the purposes of this section, the term "order of adjudication" includes an order for the administration of the estate of a debtor whose debts do not exceed 50*l*., or of a deceased person who dies insolvent. And by the Companies Act, 1862 (25 & 26 V. c. 89), s. 163, "where any company is

being wound up" under that Act "by the court, or subject to the supervision of the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents." See on this last section, *Ex pte. Liverpool Exchange Co.*, L. R., 9 Eq. 370. It protects the property of a company in liquidation, only when they are the tenants. *Ex pte. Heaven*, L. R., 6 Ch. 462; *In re Regent United Service Stores*, 8 Ch. D. 616, C. A. And see *Ex pte. N. Staffordshire Ry. Co.*, L. R., 19 Eq. 60; and *In re N. Yorkshire Iron Co.*, 7 Ch. D. 661. The effect of the J. Act, 1875, s. 10, *ante*, p. 309, is not to extend the Bky. Act, 1883, s. 42 (1), *ante*, p. 906, to the case of a company in liquidation. *Thomas v. Patent Lionite Co.*, 17 Ch. D. 250, C. A. The 51 & 52 V. c. 62, s. 1 (4, 6), and 6 E. 7, c. 58, s. 5 (3), which give in certain cases priority to claims for rates, taxes, wages, and compensation, may seriously affect the landlord's right to obtain payment of rent by distress.

Chattels belonging to the Crown while on the land of a subject are privileged. *Sec. of State for War v. Wynne*, (1905) 2 K. B. 845.

In the cases above enumerated, there is an absolute privilege from distress, though in the case of lodger's goods, the lodger must take the steps provided by the Act in order to claim the privilege; but there are other things privileged, provided there be other sufficient distress on the premises: these are—

1. Beasts that gain the land, and sheep. 51 H. 3, st. 4, Ruffhead (*Capitula Itineris*, 1 Stat. of the Realm, p. 238); Co. Litt. 47 a, b. The statute applies in every case, whether there is an intermediate tenancy between the occupier and distrainer or not. *Keen v. Priest*, 4 H. & N. 226, 239. Cart colts and young steers not broken in or used for harness or the plough, are not beasts which gain the land. S. C. See also 46 & 47 V. c. 61, s. 45, *ante*, p. 904.

2. Instruments of husbandry.

3. The instrument of a man's profession or occupation. *Simpson v. Hartopp*, *ante*, p. 903; *Nargett v. Nias*, 1 E. & E. 439; 28 L. J., Q. B. 143; Co. Litt. 47 a, b. See also 51 & 52 V. c. 21, s. 4, *ante*, p. 906, which gives absolute protection to a limited amount.

4. Growing crops seized and sold under an execution, distrained under 14 & 15 V. c. 25, s. 2, *ante*, p. 906.

5. By the Agricultural Holdings (England) Act, 1883, in the case of tenancies to which the Act applies (*vide* sects. 51, 61, *ante*, p. 893), sect. 45 provides that live stock taken on the land by the tenant, on a contract with the owner for feeding at a fair price, shall not be distrained, if there is other sufficient distress, and if there is not, then only to the amount of the price due, or to be paid, for the feeding. The "fair price" need not be in money. *L. & Yorkshire Bank v. Belton*, 15 Q. B. D. 457. Cattle on land under an agreement allowing the owner "the exclusive right to feed the grass on the land for four weeks," are not within the section. *Masters v. Green*, 20 Q. B. D. 807.

Where conditionally privileged goods are taken when there are sufficient unprivileged goods to satisfy the distress, it is wholly void, and the distrainer is liable in an action of trespass or for conversion to the full value of goods. *Nargett v. Nias*, *supra*; *Keen v. Priest*, *post*, p. 908. But if privileged goods are taken, along with others not privileged, he is a trespasser *ab initio* quâ the privileged goods only. *Harvey v. Pocock*, 11 M. & W. 740. It should be observed that the distrainer is only bound to satisfy his claim primarily, with goods that were distrainable at common law, and need not seize growing crops or other things made distrainable by statute, in preference to goods conditionally privileged. *Piggott v. Birtles*, 1 M. & W. 441.

If the landlord agree that certain goods placed on the land demised shall not be liable to distress, or that he will not distrain till a certain condition has been fulfilled, he will be liable in an action of trespass or for conversion, if he take them in breach of the agreement. *Horsford v. Webster*, 1 C. M. & R. 696; *Giles v. Spencer*, 3 C. B., N. S. 253; 26 L. J., C. P. 237. Where goods have been left in a depository warehouse, which is in the apparent possession of the landlord, he cannot seize them for rent due to a tenant to whom he has in fact let the premises. *Miles v. Furber*, L. R., 8 Q. B. 77. As to the effect of sale following seizure for a distress, of a patented article on the premises of the person licensed to use it, see *British Mutoscope, &c. Co. v. Horner*, (1901) 1 Ch. 671.

Damages.] In the case of an illegal distress, the measure of damages is usually the value of the goods seized, and no deduction can be allowed for any rent due. *Attack v. Bramwell*, 3 B. & S. 520; 32 L. J., Q. B. 146; *Nargett v. Nias*, *ante*, p. 907. So a stranger, whose sheep are on a tenant's land, may bring trespass against the landlord for distraining them, when there are other distrainable goods or cattle on the land, and may recover the full value of the sheep. *Keen v. Priest*, 4 H. & N. 236; 28 L. J., Ex. 157. The plaintiff is entitled to recover the full value of the goods, although he has only a special property in them. *Swire v. Leach*, 18 C. B., N. S. 479; 34 L. J., C. P. 150. Where there has been a wrongful seizure, and a man has been placed in possession for some days, the plaintiff may recover substantial damages though he has had the use of the goods all the time. *Bayliss v. Fisher*, 7 Bing. 153; see also *Doss v. Doss*, *post*, p. 926. In the case of distress and sale by a landlord where no rent is due, the jury ought under stat. 2 W. & M. sess. 1, c. 5, s. 4, *ante*, p. 899, in an action on that statute, to be directed to give as damages double the value of the goods seized. *Musters v. Farris*, 1 C. B. 715.

Defence.

The defence must, of course, in each case depend on the form of the statement of claim and subsequent pleadings. It will be easily gathered from what is stated with regard to the right of action in each class of illegality what defences can be raised. Where the form of action is trespass *qu. cl. fr.*, or trespass *de bonis asportatis*, or for conversion, see *Defences* to those several actions, *post*, pp. 927, 940, 981. See also *Action of Replevin*, *post*, p. 1079.

The defence of not guilty (by stat. 11 G. 2, c. 19, ss. 12, 21) as to which *vide ante*, p. 899, admits evidence of everything that might lawfully be done in order to make the distress. *Haine v. Davey*, 4 Ad. & E. 892; *Williams v. Jones*, 11 Ad. & E. 643; following *Ross v. Clifton*, *Id.* 631; *Eagleton v. Gutteridge*, 11 M. & W. 465. Where some privileged goods are taken, the defendant may justify under that defence as to the taking of goods not privileged. *Harvey v. Pocock*, *ante*, p. 907.

The defence arising under 11 G. 2, c. 19, *ante*, p. 899, and *post*, p. 1081, where the goods have been fraudulently removed, must be specially pleaded; for 11 G. 2, c. 19, s. 21, by which the landlord is enabled to plead the general issue, relates only to distresses made upon premises in respect of which the rent is due. *Furneaux v. Fotherby*, 4 Camp. 136, Ld. Ellenborough; *Postman v. Harrel*, 6 C. & P. 225, 226, Tindal, C.J.; and other cases cited 2 Wms. Saund. 284 c, (2), (d).

A landlord whose bailiff has wrongfully distrained fixtures is not liable in trespass, although he has received the proceeds, but in ignorance of the illegal act. *Freeman v. Rosher*, 13 Q. B. 780. But where the broker takes goods which it was intended that he should take, the landlord is liable for any irregularity in the conduct of the distress. *Hasclor v. Lemoyne*, 5 C. B.,

N. S. 530; 28 L. J., C. P. 103. Where a distress warrant was signed by defendant as agent of the landlord, and rent was tendered to the defendant before actual distress, the defendant was held liable in trespass for damages, including an illegal exaction by the broker employed by him of excessive costs of distress. *Bennett v. Bayes*, 5 H. & N. 391; 29 L. J., Ex. 224. The landlord is not liable for an assault committed by the broker in executing the warrant. See *Richards v. W. Middlesex Waterworks Co.*, 15 Q. B. D. 660. A pound-keeper is not liable for goods wrongfully distrained, unless he exceeds his duty or assents to the trespass. *Badkin v. Powell*, Cowp. 478. And where a servant, authorized to distrain cattle damage feasant, drives cattle off the plaintiff's land into his master's, and then distrains them, the master is not liable in trespass. *Lyons v. Martin*, 8 Ad. & E. 512. Where overseers obtained a distress warrant for rates, and handed it to the assistant overseer W. for execution, they were held not liable for illegalities committed by W. in making the distress, as he acted under his independent statutory authority. *Baker v. Wicks*, (1904) 1 K. B. 743.

The Metropolis Management Amendment Act, 1862 (25 & 26 V. c. 102), s. 96, enacts that the owner shall allow the occupier of premises to deduct out of the rent from time to time becoming due, the sums of money which the occupier pays the vestry for works done by them under the act, the occupier can only avail himself of the provision when he has actually paid the money; and therefore a distress for rent due after service of a demand for payment from the vestry, but before payment, is legal. *Ryan v. Thompson*, L. R., 3 C. P. 144. If before sale of the distress the payment be made to the vestry by the tenant, the landlord may, nevertheless, go on and sell enough of the distress to defray the expenses of the distress. *Id.* See on this case *Skinner v. Hunt*, (1904) 2 K. B. 460, 461, *per* Vaughan Williams, L.J. And where the occupier has expressly agreed with the owner to pay for such works, his payment to the vestry affords no answer to a distress. S. C. A bailiff who has been withdrawn by the landlord cannot go on and sell for this purpose; if he do so the sale is void, and no property passes to the purchaser. *Harding v. Hall*, 14 L. T. 410; E. T. 1866, Ex.

ACTION FOR SEDUCTION.

This action is founded, not upon any wrong done to the woman seduced, but upon that done to the person who has a right to her services, and who is always the plaintiff. The origin and principle of actions for seducing or enticing away servants, or those who have entered into contracts for personal service, are discussed in *Lumley v. Gye*, 2 E. & B. 216; 22 L. J., Q. B. 463. Even although the relation of master and servant do not strictly exist between A. and B., A. can sue C., for inducing B. wrongfully to break his contract of exclusive personal service with A., of which C. had notice thereby in fact and naturally causing injury to A. S. C.; *Bowen v. Hall*, 6 Q. B. D. 333, C. A.; *S. Wales Miners' Federation v. Glamorgan Coal Co.*, (1905) A. C. 239, D. P., *vide ante*, p. 891; unless there be justification for interfering with the legal right. S. C. The same principle applies to business contracts. *Temperton v. Russell*, (1893) 1 Q. B. 715, C. A.; *accord. Quinn v. Leatham*, (1901) A. C. 495, D. P.; *Hamlyn v. John Houston & Co.*, (1903) 1 K. B. 81; *Exchange Telegraph Co. v. Central News*, (1897) 2 Ch. 48; *Id. v. Gregory*, (1896) 1 Q. B. 147, C. A.; and it is sufficient to prove facts from which it may be inferred that some damage must result to A., and the damages are then at large. S. C. In all such cases, however, there must be a valid

contract between A. and B. *De Francesco v. Barnum*, 45 Ch. D. 430. Cf. *National Phonograph Co. v. Edison-Bell, &c. Co.*, (1907) W. N. 6, *cor.* Joyce, J. And it is not actionable for A. to induce a master lawfully to discharge his servant F. and not to employ him again, although damage is thereby caused to F., whatever A.'s motive may be. *Allen v. Flood*, (1898) A. C. 1, D. P. It is otherwise, however, where A. acts in concert with others with intent to injure F. See *Action for Conspiracy*, *ante*, p. 891. It must be observed that by the Trades' Disputes Act, 1906, 6 E. 7. c. 47, s. 3, "an act done by a person in contemplation or furtherance of a trade dispute," defined by sect. 5 (3), "shall not be actionable on the ground only that it induces some other person to break a contract of employment, or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

In an action for seduction, the plaintiff may have to prove (1), that the party seduced was in the plaintiff's service; and (2), the seduction and (3), the subsequent loss of service.

Evidence of the service.] Although this action cannot be maintained without some proof of the service, or liability to service, and it is not sufficient merely to show that the plaintiff has incurred an expense in consequence of the confinement of the party seduced; *Satterthwaite v. Dewhurst*, 4 Doug. 315; 5 East, 47, n.; *Grinnell v. Wells*, 7 M. & Gr. 1033; yet it is not necessary to prove an *actual contract* of service, or that wages have been paid. *Evans v. Walton*, L. R., 2 C. B. 615. Where the daughter is a minor, living at her father's house, the service may be presumed; *Harris v. Butler*, 2 M. & W. 542; *per Parke, B.*, *Maunder v. Venn*, M. & M. 324; *R. v. Chillesford*, 4 B. & C. 102; so, where a minor has been away from home in domestic service and that service is determined, the father's right to her services instantly revives, and he can maintain an action if she be seduced while returning home. *Terry v. Hutchinson*, L. R., 3 Q. B. 599. And where the daughter is of age (in which case also the action is maintainable, *Booth v. Charlton*, cited 5 East, 47; *Tullidge v. Wade*, 3 Wils. 18), the slightest evidence of service, such as milking cows, has been held sufficient. *Bennett v. Allcott*, 2 T. R. 168. Even making tea has been said to be an act of service. *Per Abbott, C.J.*, *Carr v. Clarke*, 2 Chitty, 261; *Mann v. Barrett*, 6 Esp. 32. Where a daughter has been seduced, the parents may maintain an action on the supposed relation, though the rank and circumstances of the parties make it improbable that she should be treated as a menial servant. *Fores v. Wilson*, Peake, 55.

It must in general appear that the daughter was residing with the father at the time of the seduction, or at least, that though absent from home, she was still constructively in his service. Thus, where the plaintiff put a daughter out to board and reside with the defendant as an apprentice for two years, no action was held to lie against the defendant for seducing her, whereby she became ill, and was obliged to remove to the plaintiff's house again, and to be supplied by him with medicines, &c. *Harris v. Butler*, 2 M. & W. 539. Where the daughter at the time of the seduction was acting as housekeeper to her brother-in-law, and though she might have left him when she pleased, had no intention of so doing; it was held that the action could not be maintained. *Dean v. Peel*, 5 East, 45. Where the daughter, though in the service of a relation, or keeping a separate establishment of her own, was in the habit of paying to her father part of her wages; held that this circumstance gave him no right of action. *Carr v. Clarke*, 2 Chitty, 260; *Manley v. Field*, 7 C. B. N. S. 96; 29 L. J., C. P. 79. So, although the daughter intended to return to her father's when she quitted her service;

Blaymire v. Haley, 6 M. & W. 55; or where the daughter was spending a few days' holiday with the plaintiff, her mother. *Hedges v. Tugg*, L. R., 7 Ex. 283. So, where the daughter, by permission of the mistress, did work for her mother after the usual day's work was done. *Thompson v. Ross*, 5 H. & N. 86; 29 L. J., Ex. 1; *Whitbourne v. Williams*, (1901) 2 K. B. 722, C. A.

But where the daughter lived at her father's house from 6 p.m. to 7 a.m. daily, and during the rest of her time was occupied in the service of the defendant as a labourer in husbandry: held that there was sufficient evidence of service under the father. *Rist v. Faux*, 4 B. & S. 409; 32 L. J., Q. B. 383. So, where by permission of her parents she attended to the defendant's shop for a few days, during the temporary absence of his wife, the action was held maintainable. *Griffiths v. Teetgen*, 15 C. B. 344; 24 L. J., C. P. 35. So, where the daughter was on a visit *animo revertendi*. *Johnson v. McAdam*, cited 5 East, 47; see *Terry v. Hutchinson*, *ante*, p. 910.

Where the daughter was a married woman, separated from her husband, and living as servant with her father, it was held that the latter might maintain this action, as he had a right as against a wrongdoer to her services. *Harper v. Luffkin*, 7 B. & C. 387. Where the action was brought by the aunt of the party seduced, with whom she resided, it was held that she stood *in loco parentis*, and was entitled to recover, though the mother was living. *Edmondson v. Machell*, 2 T. R. 4. So, where the plaintiff, an officer in the army, had adopted the daughter of a deceased soldier, he was held entitled to maintain this action. *Irwin v. Dearman*, 11 East, 20. So, a master, not related to his servant, may recover damages against the defendant for debauching her. *Fores v. Wilson*, Peake, 55; see *Hall v. Hollander*, 4 B. & C. 653. But, the action cannot be supported by the trustee of the bankrupt master. *Howard v. Crowther*, 8 M. & W. 601.

The relation of master and servant must exist at the time of the seduction: *Davies v. Williams*, 10 Q. B. 725; *Hedges v. Tugg*, *ante*, p. 910; and also at the time of the confinement where that is relied on as the occasion of loss of service. *S. C.*, *Id.* See also *Harris v. Butler*, *ante*, p. 910.

Evidence of the seduction and loss of service.] Loss of service consequent on the seduction is necessary to support the action whether framed in trespass: *Eager v. Grimwood*, 1 Exch. 61; or, in case: *Grinnell v. Wells*, 7 M. & Gr. 1033; see *Hedges v. Tugg*, *supra*. The action is commonly brought against the defendant for debauching the plaintiff's daughter or female servant, and in this case the illness, consequent on her pregnancy and confinement, is usually relied on as evidence of loss of service: but the action was held to lie, though the daughter had not been actually confined before action brought, and though the plaintiff had voluntarily turned her out of his house upon discovery of her pregnancy. *Per* Ld. Denman, C.J., *Joseph v. Corvander*, Winton Sum. Ass. 1834. In *Manville v. Thomson*, 2 C. & P. 303, the action was maintained, although it did not appear that the daughter had become pregnant.

The action is also maintainable for enticing or keeping a servant away from her master's service without debauching her, the actual removal of the servant constituting the loss of service. *Evans v. Walton*, L. R., 2 C. P. 615. See also *Lumley v. Gye*, and *Bowen v. Hall*, *ante*, p. 909.

Damages—Evidence in aggravation.] Although the loss of service is the legal foundation of this action, and though it is difficult to reconcile with principle the giving of greater damages on another ground, the practice has become inveterate, and cannot now be shaken. *Per* Ld. Ellenborough, C.J., in *Irwin v. Dearman*, 11 East, 24. Damages may therefore be given for the loss which the plaintiff has sustained by being deprived of the society and

comfort of his child, and by the dishonour which he suffers. *Southernwood v. Ramsden*, 2 Selw. N. P. 13th ed. 1066; *Chambers v. Irwin*, *Id.*; *Bedford v. McKowl*, 3 Esp. 119; *Tullidge v. Wade*, 3 Wils. 19; *Andrews v. Askey*, 8 C. & P. 9, 10. The jury are to take into consideration the situation in life of the parties; but evidence of the defendant's means is irrelevant to the issue, and therefore not admissible. *Hodsoll v. Taylor*, L. R., 9 Q. B. 79.

The plaintiff may prove that the defendant was addressing his daughter as an honourable suitor. *Dodd v. Norris*, 3 Camp. 519; *Elliott v. Nicklin*, 5 Price, 641. It has been held that neither in chief nor in cross-examination can the plaintiff show that the defendant had previously made a promise of marriage to the daughter; for this is a distinct cause of action by the daughter. *Dodd v. Norris*, *supra*; *Tullidge v. Wade*, 3 Wils. 19. But several cases are mentioned in 2 Stark. Evid. 3rd. ed. 990, where such evidence has been admitted, not with the view of augmenting the damages, but to vindicate the character of the person seduced, and to show the means used by the defendant to effect the injury; and in *Capron v. Dalmond*, Exeter Sp. Ass. 1831, Park, J., not only allowed proof of a promise, but also that the defendant had persuaded the daughter to take measures to destroy her offspring, and had spoken to her about hiring a nurse, and other arrangements in contemplation of marriage, these facts being all immediately connected with the act complained of.

The plaintiff is allowed to prove the amount of the expenses sustained by him in consequence of his daughter's confinement, &c. The expenses of medical attendance, though not paid, may be recovered. *Dixon v. Bell*, 1 Stark. 289. Declarations of the defendant's wife, tending to prove a confederacy between them to seduce the plaintiff's daughter, have been admitted in aggravation. *Knowles v. Compigne*, Winton Sum. Ass. 1835.

Evidence of character.] The plaintiff cannot give evidence of the daughter's good character, except in answer to evidence of *general* bad character given on the other side; *Bamfield v. Massey*, 1 Camp. 460; and even where the daughter had been cross-examined as to circumstances of extreme indelicacy and levity in her conduct, Ld. Ellenborough ruled that the plaintiff was not at liberty to call witnesses to character, for there was an opportunity of explaining on re-examination, the questions put on the cross-examination. S. C. But, in another case, where the cross-examination of the party seduced went to show that she had conducted herself immodestly towards the defendant before the seduction, and had kept improper company, the plaintiff was allowed, without objection, to prove the general good character and modest deportment of his daughter, and the general respectability of the family. *Bate v. Hill*, 1 C. & P. 100. See *ante*, pp. 86, 87.

Costs.] As to plaintiff's right to costs, *vide ante*, pp. 296, 301. The County Court has no original jurisdiction to entertain an action for seduction. 51 & 52 V. c. 43, s. 56.

Defence.

The defendant may show that he is not the father of the child, though he admits the criminal intercourse, for this negatives the loss of service. *Eager v. Grimwood*, 1 Exch. 61. As to the effect of quashing an affiliation order see *Anderson v. Collinson*, *ante*, p. 206.

Damages.—Evidence in mitigation.] Where the plaintiff has been guilty of gross misconduct in suffering the defendant to continue his visits as a suitor to his daughter, knowing that he was a married man, on an alleged probability of divorce, Ld. Kenyon non-suited the plaintiff. *Reddie v. Scoott*, Peake, 240. But it may be doubted whether this was not rather matter in reduction of

damages. In mitigation of damages the defendant may show the loose character of the girl; but if she be asked whether, before her acquaintance with the defendant, she had not been criminally connected with other men, she is not bound to answer the question. *Dodd v. Norris*, 3 Camp. 519. See further, *ante*, pp. 86, 87. Where, however, the evidence would tend to show that the defendant is not the father of the child, it may be otherwise. *Garbutt v. Simpson*, 32 L. J., M. C. 186. He may prove expressions of the daughter tending to show the levity of her character; but if the expressions *also* tend to contradict her evidence, they cannot be proved without previously asking her, on cross-examination, whether she used them. *Carpenter v. Wall*, 11 Ad. & E. 803.

ACTION FOR ASSAULT AND BATTERY.

Evidence of the assault.] An attempt to do a corporal injury to another, coupled with a present ability, or any act or gesture from which an intention to commit a battery may be implied, is an assault. *G Jenner v. Sparkes*, 1 Salk. 79; *Read v. Coker*, 13 C. B. 850; 22 L. J., C. P. 201. So, riding after a person and obliging him to run away to avoid being beaten, is an assault. *Martin v. Shoppee*, 3 C. & P. 373. To upset a chair or carriage in which a person is sitting is an assault. *Hopper v. Reeve*, 7 Taunt. 700. To throw a lighted squib at A., who, in self-defence, throws it from him, so that it accidentally falls on B., is an assault by the first thrower on B. *Scott v. Shepherd*, 2 W. Bl. 892; 1 Smith's Lead. Cases. Where parish officers cut off the hair of a pauper against her will, it was held to be an assault. *Ford v. Skinner*, 4 C. & P. 239.

A battery, which always includes an assault, is the actual doing an injury, be it ever so small, in an angry or revengeful, or rude or insolent manner, as by spitting in a man's face, or violently jostling him out of the way. *B. N. P.* 15. To throw water upon a person is a battery. *Pursell v. Horn*, 8 Ad. & E. 602. An assault or battery must be an act done against the will of the party assaulted; *per* Patteson, J., *Christopherson v. Bare*, 11 Q. B. 477. Therefore a touch or stroke in jest is no assault. *Williams v. Jones*, Cas. temp. Hardw. 301. So, a touching to engage attention. *Coward v. Baddeley*, 4 H. & N. 478; 28 L. J., Ex. 260. It is not essential that the act should appear to be wilful, it is enough if it be negligent; for no man shall be excused of a trespass except it may be judged utterly without his fault. *Weaver v. Ward*, Hob. 134; Com. Dig. Pleader, Trespass (3 M. 20, 30, 31). But it has been held by Denman, J., after reviewing the previous cases, that where the act was accidental in the sense of being unintentional, and there was no negligence, trespass will not lie. *Stanley v. Powell*, (1891) 1 Q. B. 86. Thus, where shot from the defendant's gun glanced from a tree and struck the plaintiff, the defendant was held not liable in the absence of negligence. *S. C.*

Liability of the defendant.] Where "in course of carrying out his employment the servant commits an excess beyond the scope of his authority the master is liable," even though the servant be thereby guilty of a criminal act. *Dyer v. Munday*, (1895) 1 Q. B. 742, 746, C. A., following *Greenwood v. Seymour*, 7 H. & N. 355; 30 L. J., Ex. 327, Ex. Ch. See also cases collected, *ante*, pp. 774, 775. Other cases relating to the liability of the defendant for an assault actually committed on the plaintiff by another person by his authority are collected *post*, pp. 916 *et seq.*

Damages.] The circumstances of time and place, when and where the insult was given, require different damages; thus it is a greater insult to be beaten upon the Royal Exchange than in a private room; *per* Bathurst, J., *Tullidge v. Wade*, 3 Wils. 19; and see *Bracegirdle v. Orford*, 2 M. & S. 77; *Merest v. Harvey*, 5 Taunt. 442, 444, *per* Heath, J. See further *sub tit.* *Action for false imprisonment*, *post*, p. 922. Damages must be assessed jointly against co-trespassers. *Id.* As to remoteness of consequential damage, see *Glover v. L. & S. W. Ry. Co.*, L. R., 3 Q. B. 25.

Defence.

There is no assault if the plaintiff consented to the defendant's act. *Christopherson v. Bare*, *ante*, p. 913. Nor if the injury is the result entirely of a superior agency, and is unavoidable, and the conduct of the defendant entirely without fault. *Gibbons v. Pepper*, 1 Ld. Raym. 38; *Wakeman v. Robinson*, 1 Bing. 213; *Hall v. Fearuley*, 3 Q. B. 919; B. N. P. 15. See *Holmes v. Mather*, L. R., 10 Ex. 261. And "it is believed that all the cases in which inevitable accident has been held an excuse for what *prima facie* was a trespass, can be explained on the" principle "that the circumstances were such as to show that the plaintiff had taken the risk upon himself." *Fletcher v. Rylands*, L. R., 1 Ex. 287, Ex. Ch., *per Cur.* It was held that where the assault amounted to a felony, for which the defendant had not been prosecuted, the plaintiff would be non-suit. *Wellock v. Constantine*, 2 H. & C. 146; 32 L. J., Ex. 285. In *Wells v. Abrahams*, L. R., 7 Q. B. 554, *per Cur.*, this doctrine was, however, altogether doubted. See further *Ex pte. Ball*, 10 Ch. D. 667, C. A.; *Midland Insur. Co. v. Smith*, 6 Q. B. D. 561; *Rooke v. Davy*, 10 Q. B. D. 412; and *Appleby v. Franklin*, 17 Q. B. D. 93.

Mitigation of damages.] The defendant may prove any circumstances in mitigation which tend to reduce the *quantum* of damages, and which could not have been pleaded as a defence to the action. See Rules, 1883, O. xxi., r. 4, *ante*, p. 310. Thus he may for this purpose give evidence of a prior assault on him by the plaintiff. *Syers v. Chapman*, 2 C. B., N. S. 438. See further *sub tit.* *Action for false imprisonment*, *post*, p. 923.

Evidence under defence of self-defence—Excess.] One of the most common defences in this action is that the plaintiff made the first assault, and that the defendant's battery was in self-defence. Co. Litt. 212 b. If the plaintiff take issue on this defence, he puts the whole defence in issue, and the defendant will have to prove the prior assault by the plaintiff, which occasioned the defendant's assault. *Timothy v. Simpson*, 1 C. M. & R. 757. If he prove that the plaintiff lifted up his stick and offered to strike him, it may be a sufficient assault to justify his striking the plaintiff, and he need not stay till the plaintiff has actually struck him. B. N. P. 18. But it is not every assault that will justify every battery; and it is matter of evidence whether the assault was proportionable to the battery. Thus, if A. strikes B., B. cannot justify drawing his sword and cutting off A.'s hand. *Cook v. Beal*, 1 Ld. Raym. 177. However, in such case, the plaintiff was not, in general, allowed to take advantage of the *excess* in the violence of the defendant's assault under a general replication denying the facts relied upon as a defence, but should have replied the excess. *Dale v. Wood*, 7 B. Moore, 33; *Oakes v. Wood*, 3 M. & W. 150. And now, by Rules, 1883, O. xix., r. 15, *ante*, p. 309; each party must allege all those facts not appearing in the previous pleadings, on which he means to rely, as if not raised would be likely to take the opposite party by surprise. Matters that were formerly pleaded by way of new assignment, may now be introduced by amendment, or reply,

vide ante, p. 310. Where the plaintiff alleges and proves an assault and battery, and the defence alleges matter to justify both, the defendant must prove enough of his defence to justify both. *Per Cur.*, *Lamb v. Barnett*, 1 C. & J. 294. So, when the declaration alleged an assault, a turning out of plaintiff's house, and imprisonment, and the plea (besides not guilty) justified the assault and removal by a *molliter manus*, &c., and that because the plaintiff assaulted him, the defendant gave him in charge to a constable: it was held, that if the plaintiff proved the imprisonment, the defendant must prove the prior assault by the plaintiff. *Reece v. Taylor*, 4 Nev. & M. 469; *Phillips v. Howgate*, 5 B. & A. 220.

When the plaintiff could justify his first assault, he must have replied such matter of justification specially; for it could not be given in evidence under a general replication. *King v. Phippard*, Carth. 281; B. N. P. 18. Thus, he could not show that the first assault was lawfully committed by him in enforcing a public right of way which the defendant prevented him from using. *Bird v. Jones*, 7 Q. B. 742, 750, *per* Patteson, J. And the rule would be the same under Rules, 1883, O. xix., r. 15, *ante*, p. 309.

[*Evidence on defence of justification in defence of possession.*] If the defendant pleaded that he was possessed of a house, &c., and that the plaintiff, without his licence, entered and disturbed him, whereupon he requested the plaintiff to depart, and, on refusal, gently lay hands upon him to turn him out; and the plaintiff joined issue; the defendant must have shown his possession, the plaintiff's entry and disturbance, the request to depart, and his refusal. If, in fact, the defendant was guilty of an excess of violence in resisting the plaintiff, the latter should formerly have new assigned or replied such excess. *Weaver v. Bush*, 8 T. R. 78. Rules, 1883, O. xxiii., r. 6, abolished new assignments and matters that would formerly have been new assigned, may now be introduced by amendment of the statement of claim, or by way of reply, *vide ante*, p. 310. If the plaintiff enter forcibly into the defendant's house, the latter may resist force by force without any previous request to depart, but the justification in such case should be that the plaintiff, with a strong hand, endeavoured forcibly to break and enter the defendant's close, whereupon the defendant resisted and opposed such entrance, &c., and that if any damage happened to the plaintiff, it was in defence of the possession of the close. Com. Dig. Pleader Trespass (3 M. 16, 17); *Bush v. Parker*, 1 N. C. 72; *Oakes v. Wood*, 2 M. & W. 791; 3 M & W. 150. Where a defendant pleads and proves a good cause of justification, it is no answer upon a general reply, that he, in fact, alleged and acted upon another, and a bad one at the time of the trespass; *semb. per Cur.*, in *Baillie v. Kell*, 4 N. C. 650, 651.

The occupier of a public house, not being an inn, may eject any person therefrom who does not leave it on request. *Sealey v. Tandy*, (1902) 1 K. B. 296. A defence justifying the removal of the plaintiff from a boat in defendant's possession, is not supported by proof that the boat had been engaged for one day by the defendant on a pleasure excursion, the crew employed by the owner still remaining upon it. *Dean v. Hogg*, 10 Bing. 345. Under a replication traversing generally a defence justifying in defence of his *dwelling-house*, it was not enough for the defendant to show possession of a room as a lodger. *Monks v. Dykes*, 4 M. & W. 567; *vide post*, p. 928. A defence justifying the battery in defence of the carriage of the defendant, which the plaintiff was endeavouring to take, is not supported by proof that the plaintiff stopped the carriage in order to obtain the defendant's name and address. *Gaylard v. Morris*, 3 Exch. 695.

Where the plaintiff wrongfully holds possession of land against the will of the freeholder, who assaults him while endeavouring to regain possession, no

action will lie. *Harvey v. Bridges*, 14 M. & W. 437; *per Parke, B.* See further, as to justification for assault committed in defence of possession of land, *Hayling v. Okey*, 8 Exch. 531, Ex. Ch. It is a good defence to an action for assault, that it was committed in an attempt to take from the plaintiff dead rabbits of the defendant's master, which he had refused to give up; *Blades v. Higgs*, 10 C. B., N. S. 713; 30 L. J., C. P. 347; 11 H. L. C. 621; 34 L. J., C. P. 286; or committed by forcibly preventing the plaintiff, who was on a highway, which crossed the defendant's moor, for the purpose solely of interfering with the defendant's right of shooting thereon, from so conducting himself as to interfere with that right. *Harrison v. Duke of Rutland*, (1893) 1 Q. B. 142, C. A.

Evidence on defence of reasonable chastisement.] The master of a merchant ship has power on board his ship to inflict on A., a mariner of the ship, for an offence committed thereon, reasonable chastisement commensurate with such offence; *The Lowther Castle*, 1 Hagg. Adm. 334; *Lamb v. Burnett*, 1 C. & J. 294; although the ship lay near the shore, and, owing to the master's absence, the punishment was not inflicted until four days after the offence was committed. S. C. So a master may inflict reasonable chastisement on his scholar, *Cleary v. Booth*, (1893) 1 Q. B. 465; or apprentice. *Penn v. Ward*, 2 C. M. & R. 338. If the plaintiff rely on the chastisement being excessive he must reply the excess. S. C. See cases cited *ante*, pp. 914, 915.

Evidence of justification under process of law.]—Where process is irregular merely, no action can be maintained until that process is set aside. *Per Parke, B.*, *Riddell v. Pakeman*, 2 C. M. & R. 30. And the party at whose suit it is issued, and his solicitor, may justify under it until it has been set aside. *Prentice v. Harrison*, 4 Q. B. 852. But it would seem that they cannot justify under void process, as where the court has no jurisdiction. *Parsons v. Lloyd*, 3 Wils. 341. After process has been set aside for the irregularity, the client and his solicitor are liable in trespass for an arrest or the like made under it. *Codrington v. Lloyd*, 8 Ad. & E. 449. *A ca. sa.*, set aside on the ground that it issued on a judgment for a debt under 20l., did not justify either solicitor or client; *Collett v. Foster*, 2 H. & N. 356; 26 L. J., Ex. 412; though the client had no knowledge of the issuing of the writ. See *Bates v. Pilling*, and *Jarman v. Hooper*, cited *post*, pp. 936, 937. And they were liable, even though the writ be not set aside, for the stat. 7 & 8 V. c. 96, s. 57, made the writ absolutely unlawful. *Brooks v. Hodgkinson*, 4 H. & N. 712; 29 L. J., Ex. 93. Whether set aside or not, the sheriff and his officer, and all persons acting under the sheriff, were in general protected by it, however irregular; *Woolley v. Clarke*, 5 B. & A. 746; provided it be not void on the face of it, or did not issue from a court without jurisdiction, and provided he or they did not join in the same defence with the party. *Phillips v. Biron*, Str. 509. Generally a solicitor who, as such, deliberately directs the execution of a void warrant, is liable in trespass. *Green v. Elgie*, 5 Q. B. 99. If the writ be only erroneous, a party may justify under it, after it has been set aside, for an act under it before it has been set aside. *Prentice v. Harrison*, *supra*. A judgment signed regularly and in good faith, although for an amount greater than is actually due, and afterwards set aside, furnishes a defence to an action of trespass, for an arrest on a *ca. sa.* issued thereunder. *Smith v. Sydney*, L. R., 5 Q. B. 203. As it would be otherwise, if the judgment had been signed irregularly, or in bad faith, the court will examine on what grounds the judgment was set aside. S. C. Where the defendant justified under a *ca. sa.*, and the plaintiff, admitting the writ, replied *de injuriâ absque residue*, &c., he might show that the defendant did not, in fact,

act under the writ at all, but he could not show the arrest to be a trespass *ab initio*, in consequence of antecedent matter, without a special replication. *Price v. Peek*, 1 N. C. 380. A touching by an officer through a broken pane of glass is an arrest, and justifies forcible entry and seizure of the person so arrested. *Sandon v. Jervis*, 28 L. J., Ex. 156, Ex Ch. Where the justification is under the process of an inferior court, its jurisdiction must appear on the face of the warrant. *Doyle v. Falconer*, L. R., 1 P. C. 328, and see 1 Wms. Saund. 75.

Conviction or certificate of dismissal under 24 & 25 V. c. 100, ss. 43—45, &c.] A summary conviction or a certificate of dismissal, by two justices, on a complaint, in respect of the same assault or battery, must be specially pleaded. It can only be given where there has been a hearing of the complaint “on the merits.” *Reed v. Nutt*, 24 Q. B. D. 669. Thus where the defendant was summoned before a magistrate, and attended before him accordingly, although he had previously received notice that the plaintiff would not attend or offer any evidence on the summons, it was held that a certificate granted him by the magistrate, in the absence of the complainant, was no bar to a subsequent action. S. C. In the action the question may be raised as to the jurisdiction of the magistrates to give the certificate. S. C. The certificate of dismissal is to be granted “forthwith, after the application for it by the person entitled to it,” not “forthwith on the dismissal of the complaint.” *Costar v. Hetherington*, and *Hancock v. Somes*, 1 E. & E. 802, 795; 28 L. J., M. C. 198, 196, overruling the decision on this point in *R. v. Robinson*, 12 Ad. & E. 672. The dismissal of the complaint, as not proved, is not in itself an answer, independently of the certificate. S. C. Where the magistrate convicted the defendant, but only ordered the defendant to enter into recognizances and pay the recognizance fee, this was held to be no bar to an action. *Hartley v. Hindmarsh*, L. R., 1 C. P. 553. It would seem, however, that since the Summary Jurisdiction Act, 1879 (42 & 43 V. c. 49), s. 16 (2), this would be otherwise. *R. v. Miles*, 24 Q. B. D. 423, 429, 430, *per* Hawkins, J. But a conviction of the defendant for unlawfully wounding is no bar to the action. *Lowe v. Howarth*, 13 L. T. 297, M. T. 1865, Ex. A conviction for assault on a wife is a bar to an action by her and her husband. *Masper v. Brown*, 1 C. P. D. 97. A conviction of a servant for assault committed in the course of the business of his master is no defence to an action against the latter. *Dyer v. Munday*, (1895) 1 Q. B. 742, C. A. As to proof of a conviction, see *Proof of records*, *ante*, pp. 108, 109.

Statute of Limitations.] By the Limitation Act, 1623, and 21 J. 1, c. 16, s. 3, an action for assault or battery must be brought within four years after such cause of action.

ACTION FOR FALSE IMPRISONMENT.

In the action of trespass for false imprisonment the plaintiff may be required by suitable defences to prove the fact of imprisonment, that it was caused by the defendant, and the special damage, if any. Most of the cases under the last head of trespass for assault and battery are applicable to this action.

Actions against judges, magistrates, &c.] An action does not lie against a judge of a superior court for an act done judicially; *Hamond v. Howell*,

2 Mod. 218; *Dicas v. Ld. Brougham*, 1 M. & Rob. 309; even though he acted oppressively and maliciously to the prejudice of the plaintiff and the perversion of justice. *Anderson v. Gorrie*, (1895) 1 Q. B. 668, C. A. "The general rule of law as to actions of trespass against persons having a limited authority, is plain and clear. If they do any act *beyond* the limit of their authority, . . . they thereby subject themselves to an action of trespass; but if the act done be *within the limit* of their authority, although it may be done through an erroneous or mistaken judgment, they are not thereby liable to such action"; *Doswell v. Impey*, 1 B. & C. 169, *per Cur.*; *Lowther v. Radnor*, *El. of*, 8 East, 113; *Mills v. Collett*, 6 Bing. 85. And, even where they exceed the jurisdiction, they are not liable unless they know, or have the means of knowing, the defect of jurisdiction. *Culder v. Halket*, 3 Moo. P. C. 28. For harsh, undue, or oppressive exercise of a legal authority, the remedy is not by action of trespass; *Willes v. Bridger*, 2 B. & A. 286, *per Cur.* Where a magistrate acts without those circumstances which must concur to give him jurisdiction, as where he grants a warrant without information upon a supposed charge of felony, he is liable in trespass. *Morgan v. Hughes*, 2 T. R. 225. But, if there be an information, it matters not that it is, or purports to be, founded on inadmissible evidence. *Cave v. Mountain*, 1 M. & Gr. 257. As to what information is necessary to justify the issuing of a search warrant see *Jones v. German*, (1897) 1 Q. B. 374, C. A. Where a magistrate commits a person for re-examination for an unreasonable time, he is answerable in trespass; the continuance of a person in custody after a reasonable time being a new trespass; *Davis v. Capper*, 10 B. & C. 98; and whether reasonable or not is a question for a jury. *Cave v. Mountain*, *supra*. The period of remand, in the case of a charge of an indictable offence, must not exceed eight clear days (11 & 12 V. c. 42, s. 21), except in cases falling within 42 & 43 V. c. 49, s. 24 (2). Actions against justices of the peace for acts done by them in the execution of their office are regulated by stat. 11 & 12 V. c. 44, noticed *sub tit.* *Actions against justices*, *post*, p. 1136. Where an officer detains a person under process after bail tendered, or other ground of discharge, he is (at least where he has no notice of the facts affording ground of discharge) not liable in trespass. *Smith v. Egginton*, 7 Ad. & E. 167, 175. A sheriff is not liable in trespass if, in obedience to a *ca. sa.*, he arrest or detain a person who is privileged from arrest, although he had notice of the privilege. *Tarlton v. Fisher*, 2 Doug. 671; *Magnay v. Burt*, 5 Q. B. 381; *Ames v. Waterlow*, L. R., 5 C. P. 53. He may take a judgment debtor D. arrested under a commitment issued under the Debtors Act, 1869, s. 5, *ante*, p. 887, to prison within 24 hours of his arrest, for D. is not arrested by virtue of an "attachment for debt," within the meaning of the Sheriff's Act, 1887 (50 & 51 V. c. 55), s. 14 (1). *Mitchell v. Simpson*, 25 Q. B. D. 183, C. A. It has been stated to be a trespass to remove a prisoner to a *wrong class* in a prison; see *Cobett v. Grey*, 4 Exch. 729; but, although imprisonment in a part of the prison in which the plaintiff cannot legally be confined, is *prima facie* a trespass, the case hardly shows that every irregular distribution of prisoners, under lawful commitment, is a trespass by the gaoler. *Kemp v. Neville*, *post*, p. 919. In *Osborne v. Milman*, 17 Q. B. D. 514, it was assumed that trespass lay for placing a first class misdemeanant on the criminal side of the prison and treating him as a convicted criminal: the judgment was reversed (18 Q. B. D. 471, C. A.), on the ground that the plaintiff was a criminal. The plaintiff had been arrested, and carried before the defendant, the Vice-Chancellor of the University of Cambridge, and by him she was sentenced to imprisonment in a private gaol called the Spinning House. No witnesses were examined at the hearing of the charge against the plaintiff, nor was any warrant of commitment prepared at the time. The defendant acted *bona fide*, and to the best of his judgment and

discretion, but, as the jury found, had not made due inquiry into the character of the plaintiff. It was held, that as the charter of the university expressly gave authority to the defendant to punish by imprisonment or otherwise, he thereby became a judge of a court of record, the proceedings of which court could be proved or disproved by the record only, to be made up whenever required; and as no form of proceeding was defined by the charter, either for the hearing, or the determination, or the committal, an action of trespass could not be sustained for any of the judicial acts complained of; and that as the place of confinement appeared to be the accustomed place used for that purpose by the university, it must be taken to be a lawful gaol. *Kemp v. Neville*, 10 C. B., N. S. 523; 31 L. J., C. P. 158. The powers so granted by the charter were repealed by stat. 57 & 58 V. c. lx., s. 5. The judge of a consular court having plenary civil jurisdiction over British subjects within its limits has the same immunities as the judge of a court of record. *Haggard v. Pelicier Frères*, (1892) A. C. 61, J. C. In the case of imprisonment of A. for a defined number of days, under a warrant, the time begins to run from the day A. is lodged in gaol. *Ex pte. Foulkes*, 15 M. & W. 612. See also *Henderson v. Preston*, 21 Q. B. D. 362. In order to maintain an action here, in respect of a wrong committed abroad in M., the wrong must be such as would have been actionable if committed here, and was not legal in M. *Phillips v. Eyre*, L. R., 6 Q. B. 1, 28, 29, Ex. Ch.; *Carr v. Francis Times & Co.*, (1902) A. C. 176, D. P.

An action of trespass cannot be maintained against a judicial officer, as against the steward of a court baron, where his bailiff by mistake takes the goods of A. under a precept against B. *Holroyd v. Breare*, 2 B. & A. 473. But, if the steward of a court baron, or hundred court, instead of leaving process to be executed by the usual officer, directs it to persons named by the party from whom he takes an indemnity, he is then liable in trespass for their acts. *Bradley v. Carr*, 3 M. & Gr. 221. In *Kelly v. Lawrence*, 3 H. & C. 1; 33 L. J., Ex. 197, Ex. Ch., M. K., the plaintiff, was served by mistake with a writ against I. W. K., another person. He told the process-server his name, and that he was not the man named in the writ. As the plaintiff did not appear, a judgment was obtained, and a *ca. sa.* issued, under which he was arrested by virtue of a warrant from the sheriff to his officer directing him to take I. W. K. It was held (on the authority of *Walley v. McConnell*, 13 Q. B. 903), that the sheriff was liable to an action for false imprisonment. See *Stratten v. Lawless*, 14 Ir. C. L. R. 432, and *De Mesnil v. Dakin*, cited *post*, p. 922. Where a county court judge issues a warrant of commitment against a person not within his jurisdiction, but whom he *bonâ fide* believes to be within it, not by reason of any erroneous statement of facts made before him, but in misapprehension of the law, he is liable in trespass. *Houlden v. Smith*, 14 Q. B. 841. The clerk of a county court, acting under 9 & 10 V. c. 95, s. 102, was a mere ministerial officer, and was not liable in trespass for imprisonment under a warrant reciting a bad order; *Dews v. Riley*, 11 C. B. 435; 20 L. J., C. P. 264; and a registrar acting under the County Courts Act, 1888, ss. 26, 161, seems to be protected in the same way. As to the authority of a revising barrister to turn a person out of his court under 28 & 29 V. c. 36, s. 16, see *Willis v. Macleuchlan*, 1 Ex. D. 376.

See further, as to the liability of magistrates and officers, *sub tit. Actions against constables, justices, &c.*, *post*, pp. 1131 *et seq.*

Form of action with regard to private persons.] If a party act himself in apprehending another, he is liable in trespass; but if he falsely and maliciously, and without any probable cause, put the law in motion, it is properly the subject of an action for malicious prosecution. *Morgan v.*

Hughes, 2 T. R. 225, 231; *Else v. Smith*, 1 D. & Ry. 103; *Barber v. Rollinson*, 1 Cr. & M. 330; *Grinham v. Willey*, and *Austin v. Dowling*, *infra*.

Where a constable had arrested the plaintiff in consequence of information received from the defendant, the fact of the defendant having, at the constable's request, signed the charge sheet, did not render him liable to an action of trespass. *Grinham v. Willey*, 4 H. & N. 496; 28 L. J., Ex. 242. *Accord. Sewell v. Nat. Telephone Co.*, (1907) 1 K. B. 557, C. A. But, it was held otherwise where the constable refused to keep the plaintiff in custody unless the defendant signed the charge sheet, which he then did. *Austin v. Dowling*, L. R., 5 C. P. 534.

A solicitor who places a writ of execution in the hands of an officer is not guilty of trespass, though he may be persuaded that the officer will execute it in a place which turns out, upon inquiry, to be out of his jurisdiction. *Sowell v. Champion*, 6 Ad. & E. 407, 417. But, if he direct it to be executed there, or if the officer tell the solicitor of his intention, and the solicitor, knowing it to be illegal, acquiesce in it, it may make him a trespasser. See 1 Wms. Saund. 75, (*h*). An attorney who obtained a warrant from a commissioner of bankrupt to arrest a party summoned for examination, was not liable in trespass, though it proved invalid, and though he urged the issuing of it, and gave it to the messenger to be executed. *Cooper v. Harding*, 7 Q. B. 928. And in an action of trespass, though the plaintiff's counsel opens the case as an arrest upon an illegal warrant, the plaintiff is not bound to produce the warrant, but the defendant, if he rely upon it, must produce it. *Holroyd v. Doncaster*, 3 Binn. 492. Though an arrest under a *ca. sa.* on a judgment for a debt under 20*l.* is illegal, yet the sheriff may justify under it. *Brooks v. Hodgkinson*, cited *ante*, p. 916. Where the defendant represented that the plaintiff was a fit person to be impressed, and in consequence he was impressed though not a fit person, it was held that the defendant was liable in trespass. *Flewster v. Royle*, 1 Camp. 187. It would seem, however, that this ruling is questionable, unless the defendant directed the impressment; if the defendant only meant that he believed the plaintiff to be a fit person, or was ready to prove it, this would hardly make him a co-trespasser. *Gosden v. Elphick*, 4 Exch. 445; see *Grinham v. Willey*, *supra*. Where a sheriff's officer arrested a person under two writs, and detained him after he had a right to discharge under one, until he had given a bailbond in both, yet trespass did not lie, if in fact his imprisonment was justifiable under the other. *Blessley v. Sloman*, 3 M. & W. 40. The plaintiff, solicitor in a Chancery suit, was succeeded by S., who obtained a writ of attachment against him for refusing to deliver up certain papers. The plaintiff was detained under the attachment, and unsuccessfully applied to the M. R. to set it aside. This decision was reversed by the L.J.J., who discharged the plaintiff from custody. It was held that neither S., nor his client, was liable in trespass. *Williams v. Smith*, 14 C. B., N. S. 596. If the defendant authorized his servant to arrest the plaintiff, it is no defence that the servant is a sworn constable. *Mahoney v. Besley*, 4 F. & F. 544.

As the implied authority of a servant to arrest a person on behalf of his master, see *Abrahams v. Deakin*, (1891) 1 Q. B. 516, C. A. (following *Allen v. L. & S. W. Ry. Co.*, L. R., 6 Q. B. 65); *Hanson v. Waller*, (1901) 1 K. B. 390; see also cases cited *sub tit. Actions by and against companies—Torts by corporations*, *post*, pp. 1094 *et seq.* As to the liability of the chairman of a meeting for the arrest of person present, see *Lucas v. Mason*, L. R., 10 Ex. 251.

As to action for false imprisonment against a company, *vide post*, pp. 1094 *et seq.*

Proof of the imprisonment.] A total restraint of the liberty of the person for however short a time, "even by forcibly detaining the party in the streets against his will," will amount in law to an imprisonment. *Bird v. Jones*, 7 Q. B. 742, 752, citing 2 Selw., N. P., 11th ed. 915 (13th ed. 846), and 22 Ass. f. 104, pl. 35, *per* Thorp, C.J. See also *Warner v. Riddiford*, 4 C. B., N. S. 180. But it is no imprisonment to prevent a person from walking in any but one particular direction along a highway. *Bird v. Jones*, *supra*. See *Wright v. Wilson*, 1 Id. Raym. 739; and *Imes v. Wylie*, 1 Car. & K. 257.

An arrest is not confined to corporal seizure. Where an officer entered the room in which the defendant was, and locked the door, telling him at the same time that he arrested him, the court held it to be a good arrest, though not a battery. *Williams v. Jones*, Cas. temp. Hardw. 300. Placing a party under arrest by a sheriff's officer, who held a writ of *capias*, without proceeding to actual contact, amounted to an arrest. *Grainger v. Hill*, 4 N. C. 212. If a bailiff who has process against any one says to him (whether on foot or riding), "You are my prisoner; I have a writ against you," upon which he submits, and goes with him, though the bailiff never touches him, yet this is an arrest, because he had submitted to the process; but if instead of going with the bailiff he runs away or escapes, it is no arrest unless the bailiff had actually laid his hand on him. *Horne v. Battyn*, B. N. P. 62. Where the constable said to the plaintiff, "You must go with me," on which the plaintiff said, "he was ready to go," and went with the constable towards a police office without being seized or touched, this was ruled to be an imprisonment; and *per* Abbott, C.J., "If a person send for a constable, and give another in charge for felony, and the constable tell the party charged that he must go with him, on which the other, in order to prevent the necessity of actual force being used, expresses his readiness to go, and does actually go, this is an imprisonment." *Pocock v. Moore*, Ry. & M. 321; *Chinn v. Morris*, 2 C. & P. 361. The law on this point was thus laid down by Eyre, C.J., in *Simpson v. Hill*, 1 Esp. 431: "If the constable, in consequence of the defendant's charge, had for one moment taken possession of the plaintiff's person, it would be in point of law an imprisonment; as, for example, if he had tapped her on the shoulder, and said, 'You are my prisoner,' or if she had submitted herself into his custody, such would be an imprisonment; but the merely giving her in charge without any taking possession of the person, where nothing more passes than merely the charge, is not by law a false imprisonment." In the following case the circumstances were held to constitute an imprisonment. The plaintiff appeared before the defendant, a magistrate, to answer the complaint of A. for unlawfully selling his dog. The defendant advised the plaintiff to settle the matter by paying a sum of money, which the plaintiff declined. The defendant then said, he would convict the plaintiff in a penalty under the Trespass Act, in which case he would be committed to prison. The plaintiff still declined paying, and said he would appeal. The defendant then called in a constable, and said, "Take this man out, and see if they can agree to settle the matter; and if not, bring him in again, as I must proceed to commit him under the Act." The plaintiff then went out with the constable, and settled the matter by paying a sum of money. It was held, that this was an assault and false imprisonment, for which trespass would lie: and which, as no conviction had been drawn up, the defendant could not justify. *Bridgett v. Coyney*, 1 M. & Ry. 211. Where a sheriff's officer, having a warrant to arrest A., sent a message to him to fix a time to call and give a bailbond, and A. fixed a time, attended and gave bail: held (in an action for malicious arrest), that this was no arrest. *Berry v. Adamson*, 6 B. & C. 528; *George v. Radford*, 3 C. & P. 464. See also *Bieten v. Burridge*, 3 Camp. 139, *ante*, p. 890. Proof of

detainer satisfies the allegation of an arrest. *Whalley v. Pepper*, 7 C. & P. 506.

Damages.] If the plaintiff have been compelled by arrest under a void warrant to pay more money than is due, he is entitled to recover back the whole, and not only the over-payment. *Clark v. Woods*, 2 Exch. 395. The plaintiff H. D. M., was arrested under a *capias* issued against O. D. M. at the suit of X.; the plaintiff protested that he was not the defendant in that action, but in order to obtain his release, lodged the debt, 40*l.* and 10*l.* for costs, under the stat. 43 G. 3, c. 46, s. 2, in the hands of the sheriff's officer, who thereupon paid the sum into court, and it was taken out by X.: it was held, that in an action against the sheriff, the plaintiff was entitled to recover the 50*l.* he had paid, in addition to general damages for the arrest. *De Mesnil v. Dakin*, L. R., 3 Q. B. 18.

Where the plaintiff, being unjustifiably arrested on a charge of felony, was remanded by the magistrate, the defendant who made the charge is not liable for damages for the imprisonment under the remand, for that is not his act. *Lock v. Ashton*, 12 Q. B. 871. In an action for malicious prosecution the case would, it seems, have been different. Defendant, a coroner, by a warrant of commitment on his inquisition, without jurisdiction, caused the plaintiff to be imprisoned: he was bailed, and afterwards, while on bail, procured the inquisition to be quashed; held, that in an action for such false imprisonment, plaintiff was entitled, under an allegation that he had incurred expense in procuring his discharge from custody, to recover damages for the expense of quashing the inquisition, in order to recover his state of freedom. *Foxall v. Barnett*, 2 E. & B. 928; 23 L. J., Q. B. 7. *Secus*, if he had previously recovered it. S. C., *per Cur.* following *Holloway v. Turner*, 6 Q. B. 928. Where the defendant gave the plaintiff in charge to a policeman, and she was taken to a police station, evidence that she was there stripped and searched was held admissible as a part of the injury suffered, such being the usual course of dealing with persons taken to the station. *Dunphy v. Moore*, 13 L. T. 197, E. T. 1865, Ir. Q. B. The act of putting on the record a special defence imputing felony, which is abandoned at the trial, may be urged in aggravation. *Warwick v. Foulkes*, 12 M. & W. 507.

Damages must be assessed jointly against co-trespassers, although the motives of all may not be equally culpable. *Eliot v. Allen*, 1 C. B. 18. And the criterion of damage is the injury sustained, and not the act or motives of the most guilty, or the least guilty of the defendants. *Clark v. Newsam*, 1 Exch. 131. See also *Dawson v. McClelland*, *ante*, p. 863.

Defence.

All matters in justification must now be pleaded specially; Rules, 1883, Q. xix. rr. 15, 17, *ante*, p. 309: except where certain Acts of Parliament enable the party to plead generally; *vide*, *Not guilty by statute*, *post*, p. 923.

Justification on the ground of felony, &c.] A private person is justified in arresting, or ordering the arrest of the plaintiff, when a felony has actually been committed, and there is reasonable and probable cause to suspect that the plaintiff committed the felony. *Beckwith v. Philby*, 6 B. & C. 635, 638. But, this does not extend to a misdemeanor committed; *Mathews v. Biddulph*, 3 M. & G. 390, 395; except in cases of breach of the peace committed in the defendant's presence, with a danger of a renewal of the breach. *Timothy v. Simpson*, 1 C. M. & R. 757, 761; *Ingle v. Bell*, 1 M. & W. 516, 519.

As to what constitutes reasonable and probable cause, and how far it is a question for the judge or for the jury, see *ante*, pp. 883 *et seq.*

As to justification, under the Army Act, 1881, of the arrest on a charge

of felony of a volunteer who had been training in a camp, see *Marks v. Frogley*, (1898) 1 Q. B. 888, C. A.

Under the provisions of several statutes, it is made lawful to arrest persons "found committing" offences against those Acts respectively. By the Larceny Act, 24 & 25 V. c. 96, s. 103, and the Act relating to the coin, 24 & 25 V. c. 99, s. 31, the arrest may be made by any person; by the Act relating to malicious injuries to property, 24 & 25 V. c. 97, s. 61, the arrest may be made by the owner of the property injured or his servant, or by any person authorized by him. By the Metropolitan Police Act, 2 & 3 V. c. 47, s. 66, the arrest may be made by any constable, or the owner of the property, on or with respect to which, the offence shall be committed, or by his servant or any person authorized by him. Where the charge was "that the plaintiff had embezzled various sums within the last fortnight," it was held that the defendant was not within the protection of the Act. *Field v. Musgrove*, 16 L. T. 536, Lush, J. See also *Griffith v. Taylor*, 2 C. P. D. 194, C. A. Where the statute (24 & 25 V. c. 96, s. 103) allows the offender to be "immediately" apprehended, it was decided that this meant immediately after the commission of the offence, and not after its discovery. *Downing v. Capel*, L. R., 2 C. P. 461; see also *Griffith v. Taylor*, *supra*.

In the case of the offences against the Pawnbrokers Act, 1872 (35 & 36 V. c. 93), defined by sect. 34, and also "where on an article being offered in pawn to a pawnbroker, he reasonably suspects that it has been stolen or otherwise illegally or clandestinely obtained, the pawnbroker may seize and detain the person and the article or either of them, and shall deliver" them or either of them into the custody of a constable. The question of reasonable suspicion is for the judge and not the jury. *Howard v. Clarke*, 20 Q. B. D. 558.

As to when a constable is justified in arresting a person, see Part III. *sub tit. Actions against constables.—Defence, post*, p. 1135.

[*Not guilty by statute.*] The justification must, as above stated, be in general pleaded specially, but by certain statutes a justification for acts done in pursuance of these statutes was allowed to be given in evidence under "not guilty"; this defence is retained by O. xix., r. 12, *ante*, p. 309; the right to plead it, however, given by any public general act passed prior to Dec. 5, 1893, has as regards any proceeding to which 56 & 57 V. c. 61 applies, been abolished by sect. 2 (*e*); and the defendant must in such case plead his defences specially. Sect. 1 (*c*, *d*), however, introduces special provisions as to tender of amends, and sect. 1 (*a*) fixes 6 months as the period of limitation of action. See hereon *post*, pp. 1131 *et seq.*

As to how the defence is to be pleaded, see O. xxi., r. 19, *ante*, p. 310.

In an action for giving the plaintiff into custody on a charge of stealing oysters from an oyster bed, it was held that the defendant could not, for the purpose of proving *bona fides* on his part (which he wished to prove, in order to show that he was entitled to notice of action) give evidence of a prior conviction of a third party for stealing oysters from the same bed, such conviction not having come to the knowledge of the defendant, at the time of his giving the plaintiff into custody. *Thomas v. Russell*, 9 Exch. 764; 23 L. J., Ex. 233.

[*Statute of Limitations.*] By the Limitation Act, 1623, 21 J. 1, c. 21, s. 3, an action for false imprisonment must be brought within four years after such cause of action.

[*Evidence in mitigation.*] The defendant may prove in mitigation any

circumstances which tend to reduce the *quantum* of damages and which could not have been pleaded as a defence to the action. See Rules, O. xxi., r. 4, *ante*, p. 310. Where the defendant had given the plaintiff in charge of a constable for felony, he was allowed to show reasonable ground of suspicion in mitigation of damages. *Chinn v. Morris*, Ry. & M. 424. So, in trespass for false imprisonment against the captain of a ship, Buller, J., admitted under the plea of Not guilty evidence of expressions used by the plaintiff at the time tending to create mutiny and disobedience; for everything which passed at the time is part of the transaction on which the plaintiff's action is founded, and he cannot therefore be surprised by the evidence. *Bingham v. Garnault*, 1 Esp. Dig. N. P. 337; B. N. P. 17. But, in trespass for assault and battery, plea Not guilty, where evidence was offered that the beating was given by way of punishment for misbehaviour on board the ship of which defendant was captain, and it was insisted that the conduct of the plaintiff at the time of the assault, being necessarily in evidence, proved the misbehaviour, it was held that as no justification was pleaded, the jury should give damages to the amount of the injury suffered, without lessening them on account of the circumstances under which it was inflicted. *Watson v. Christie*, 2 B. & P. 224.

In trespass for imprisonment on a charge of obtaining goods by false pretences, where the only plea was Not guilty, the plaintiff's witnesses could not be cross-examined on the plaintiff's character, or on previous charges against him. *Downing v. Butcher*, 2 M. & Rob. 374. Nor where the charge was of stealing money could the defendant, under Not guilty, give evidence of apparent losses of money on his part, though offered for the purpose of explaining the circumstances which induced in his mind a belief in the plaintiff's guilt. *Yardley v. Hine*, 17 L. T. 264, *cor.* Blackburn, J.

ACTION FOR TRESPASS TO PERSONAL PROPERTY.

This action is founded on the plaintiff's possession of goods, and it includes every direct forcible injury or act disturbing the possession without the consent of the owner, however slight or temporary the act may be. *Fouldes v. Willoughby*, 8 M. & W. 540; Bullen & Leake, *Prec. of Plead.* 3rd ed. 291, n.; 6th ed., 346, n. Thus, moving jewellery of a deceased person from one room to another is a trespass. *Kirk v. Gregory*, 1 Ex. D. 55. Locking up the plaintiff's goods in a room which he has occupied, and refusing to let him have them till the rent is paid, is not an act for which trespass for taking and removing goods lies. *Hartley v. Moxham*, 3 Q. B. 701. See also *West v. Nibbs*, 4 C. B. 172, *ante*, p. 900.

The evidence for the plaintiff varies according to the nature of the issue joined between the parties.

[*What possession of the plaintiff is sufficient.*] Any possession is sufficient property as against a third person who has no title at all. *Com. Dig. Tresp. (B. 4)*; *Nelson v. Cherrill*, 8 Bing. 316; *Oughton v. Sepplings*, 1 B. & Ad. 241; *Elliott v. Kemp*, 7 M. & W. 306, 312, *per Cur.*; 2 Wms. Saund. 47 *f.* (1). Therefore a mere wrong-doer cannot set up the title of the real owner unless he justifies under him. *Carter v. Johnson*,

2 M. & Rob. 263. The master of a ship or boat may bring trespass for an injury to it, though not his property. *Moore v. Robinson*, 2 B. & Ad. 817. And property is sufficient without possession, for the right of property draws to it the possession. *Bulme v. Hutton*, 9 Bing. 471, 477; Ex. Ch. *per Cur.*; 2 Wms. Saund. 47 b, (1). Therefore, where goods are taken after the owner's death and before probate granted to his executor, the latter, after probate granted, may maintain trespass. *Com. Dig. Tresp. (B. 4)*; *Smith v. Milles*, 1 T. R. 480, *per Cur.* See *Kirk v. Gregory*, *ante*, p. 924. So, an administrator, after he has taken out letters of administration, can sue for a trespass committed before the letters were taken out. *Tharpe v. Stallwood*, 5 M. & Gr. 760. So, the lord of a manor may maintain trespass for an estray or wreck before seizure by him. *Smith v. Milles*, *supra*; *Dunwich, Bailiffs, &c. of v. Sterry*, 1 B. & Ad. 831. So, the vendee of goods, when the property passes, may bring it, though he never had possession. *Thomas v. Phillips*, 7 C. & P. 573.

If one lend oxen to another to plough his lands, and he kill them, the owner may have trespass or trespass on the case at his election. Litt. sect. 71. As to a bailor maintaining an action against a vendee to whom the bailee has sold the goods, see *Cooper v. Willomatt*, 1 C. B. 672, noticed *post*, p. 968. *Ld. Abinger, C.B.*, was of opinion that where the plaintiff left a certificate of his character with the defendant, he could not maintain trespass for an injury to it while in the defendant's custody. *Taylor v. Rowan*, 1 M. & Rob. 491. But the distinction between trespass and case is now material. See *Wennhak v. Morgan*, *post*, p. 926. And generally, if the owner of a chattel gratuitously permit another to use it, he may maintain trespass for injury done to it by a third person while so used. *Lotan v. Cross*, 2 Camp. 464; see *White v. Morris*, 11 C. B. 1015. Where a mortgagee of chattels is not to enter till default, he cannot bring trespass against a third party before such entry. *Wheeler v. Montefiore*, 2 Q. B. 133. An auctioneer, in possession of a house for the purpose of selling fixtures, which are to be removed by the buyer and paid for on removal, cannot bring trespass *de bonis asportatis* against the buyer if he take them without payment. *Davis v. Danks*, 3 Exch. 435.

A freeholder who has leased his land for years without any reservation of the timber, may have, during the continuance of the term, trespass for taking and removing goods against a third person who wrongfully cuts down the timber, and carries it away. *Ward v. Andrews*, 2 Chitty, 636. But the lessee cannot maintain an action for timber severed from the freehold. *Evans v. Evans*, 2 Camp. 491. Fixtures easily removable without injury to the freehold do not necessarily become part of the freehold, but the jury may find that they are the property of a person other than the freeholder; as in the case of hatches put into a stream by his consent for the use of another; *Wood v. Hewett*, 8 Q. B. 913; or a door hung on hooks; *Mant v. Collins*, *Id.* 916, n.; or a pile driven into the bed of a public navigable river for the private convenience of the owner of a wharf; *Lancaster v. Eve*, 5 C. B., N. S. 717; 28 L. J., C. P. 235; or a signboard; *Moody v. Steggles*, 12 Ch. D. 261; or a fascia; *Francis v. Hayward*, 22 Ch. D. 177, C. A.; or tapestry fastened to the walls of a house; *Leigh v. Taylor*, (1902), A. C. 157, D. P. See further, cases cited *post*, pp. 968 *et seq.*

Trespass does not lie for taking animals *feræ naturæ*, unless reclaimed or privileged *ratione loci*; *Bac. Ab. Tresp. (E.)*. Nor, will it lie for fish which the plaintiff had nearly secured in his net at sea, but was prevented by the defendant from wholly enclosing. *Young v. Hichens*, 6 Q. B. 606. When animals *feræ naturæ* are killed by a trespasser they become the absolute property of the owner of the land where they are killed. *Blades v. Higgs*,

11 H. L. C. 621; 34 L. J., C. P. 286. An action will lie for beating the plaintiff's horse or dog, whereby he lost the use of it. *Wright v. Ramscot*, 1 Wms. Saund. 84; *Slater v. Swann*, Str. 872. See *Dand v. Sexton*, 3 T. R. 37.

As to when trespass will lie for an illegal distress, *vide ante*, pp. 899 *et seq.*

Where two persons are apparently in possession of goods, the legal possession follows the title. *Ramsay v. Margrett*, (1894) 2 Q. B. 18, C. A.

Evidence to connect the defendant with trespass.—Relation.] A party is not liable for the act of a stranger, as for the act of a postilion driving him in a hired carriage, &c., *ante*, p. 776. So, where a man, during a procession held in his honour, imprudently, but lawfully and without any intention on his part so to do, acts in such a way as to incite others to commit damage, he is not liable for that damage. *Peacock v. Young*, 21 L. T. 527, M. T. 1869, Q. B. But where the defendant sat on the box of a hired carriage, and was heard to give the postilion directions, this was held evidence of a joint trespass in a case of collision. *McLaughlin v. Pryor*, 4 M. & Gr. 48. And trespass will lie though the injury be unintentional; *Covell v. Laming*, 1 Camp. 497; but not in such case, unless it be negligent. *Stanley v. Powell*, *ante*, p. 913. Trespass against A. and B. for taking plaintiff's gun. Plaintiff proved that A. took it, and afterwards delivered it to B., who refused to give it up to the plaintiff: held that this did not make B. a joint trespasser by relation, unless it was at first taken for B.'s use or benefit. *Wilson v. Barker*, 4 B. & Ad. 614; see *Wilson v. Tumman*, 6 M. & Gr. 236, *post*, p. 977, and *Keighley Maxsted & Co. v. Durant*, *ante*, p. 312. The solicitor of a judgment creditor, issuing a *fi. fa.*, has no implied authority to direct the sheriff to seize particular goods thereunder. *Smith v. Keal*, 9 Q. B. D. 340, C. A. It is a question of fact whether the seizure by the sheriff, of particular goods, was directed by the execution creditor, so as to make him liable therefor. S. C. If the sheriff seize the goods of a stranger, the execution creditor does not make himself liable by accepting an interpleader issue to try the title to the goods. *Woollen v. Wright*, 1 H. & C. 554; 31 L. J., Ex. 513, Ex. Ch. See further as to the liability of the judgment creditor, and his solicitor, in respect of seizure of goods under process, *ante*, p. 916, and *post*, pp. 936, 937. As to the liability of a landlord, and of his agent, who signed the distress warrant, for the wrongful acts of the bailiff employed in distraining, *vide ante*, pp. 908, 909. For other cases of relation, see further, *post*, pp. 936, 977, and Part III., *sub tit. Actions against sheriffs*, *post*, pp. 1184 *et seq.*

Trespass lies against a corporation for the act of an agent in the course of his duty; as where he distrains barges for toll claimed to be due. *Maud v. Monmouth Canal Co.*, 4 M. & Gr. 452, *vide* Part III., *Actions by and against companies—Torts by corporations*, *post*, pp. 1094 *et seq.*

Damages.] In trespass for taking goods, under process, in a place out of the jurisdiction of the court, the plaintiff is entitled to the value of the goods, and not merely to the damage sustained by reason of the taking in a wrong place. *Sowell v. Champion*, 6 Ad. & E. 407. In an action for taking goods under a legal process wrongfully issued, the plaintiff is entitled at least to nominal damages, or to such substantial damages as the jury think adequate, although special damage is alleged but not proved. *Doss v. Doss*, 14 L. T. 646, Mar. 1866, J. C. In an action for maliciously damaging a written statement of a servant's character, damages may be substantial. *Wennhak v. Morgan*, 20 Q. B. D. 635.

As to damages for an illegal distress, *vide ante*, p. 908.

In trespass for destroying a picture, the defendant may show that it was a

scandalous libel; and the plaintiff shall only recover the value of the canvas and paint; *Du Bost v. Beresford*, 2 Camp. 511; and *quere*, if he be entitled to recover at all? *Fordes v. Johnes*, 4 Esp. 97. In trespass for taking the plaintiff's goods under colour of a judgment, the plaintiff cannot recover as special damage (though specially claimed) the costs of setting aside the judgment. *Holloway v. Turner*, 6 Q. B. 928; explained in *Foxall v. Barnett*, cited *ante*, p. 922, *per Cur.* Repayment of the proceeds of goods wrongfully taken, *after action brought*, is not evidence in mitigation unless specially pleaded. *Rundle v. Little*, 6 Q. B. 174. A vendor who retakes goods sold by him to the plaintiff is liable to the full value, and cannot reduce the damages by setting off the unpaid price. *Gillard v. Brittan*, 8 M. & W. 575; *Page v. Cowasjee*, L. R., 1 P. C. 127, 147. The sheriff wrongfully seized the goods of the plaintiff on a writ against A.; after seizure, a water company distrained them for rates due from A., and the plaintiff thereupon paid the rates to get back the goods; held, that A. could recover, as special damage, in trespass against the sheriff, the money paid to get them back. *Keene v. Dilke*, 4 Exch. 388. In *Walker v. Olding*, 1 H. & C. 621; 32 L. J., Ex. 142, the defendant, as execution creditor, wrongfully took in execution the plaintiff's goods, and they were sold under a sheriff's interpleader order, and the proceeds paid into court. The interpleader issue was decided in the plaintiff's favour. Held, that he could not recover from the defendant damages incurred since the date of the order. In *Brierly v. Kendall*, 17 Q. B. 937; 21 L. J., Q. B. 161, where an assignment had been made to secure a debt, and the assignees prematurely took possession of the goods; it was held that the assignor was only entitled to recover the value of his limited interest in the goods; and see *Toms v. Wilson*, 4 B. & S. 442; 32 L. J., Q. B. 33; 4 B. & S. 445; 32 L. J., Q. B. 382, Ex. Ch.; *Massey v. Sladen*, L. R., 4 Ex. 13.

By the Civil Procedure Act, 1833, 3 & 4 W. 4, c. 42, s. 29, cited *ante*, p. 625, the jury may in this action, give damages in the nature of interest over and above the value of the goods. It would seem, however, that this enactment was unnecessary, as the damages are unlimited in this form of action. *Balme v. Hutton*, 9 Bing. 477, Ex. Ch. *per Cur.*

Damages must be assessed jointly against co-trespassers, *vide ante*, p. 922.

Defence.

Any matters relied on in justification must be pleaded specially. Rules, 1883, O. xix., rr. 15, 17, *ante*, p. 309.

As to justification under process, *vide ante*, p. 916.

As to the defence of not guilty by statute generally, *vide ante*, p. 923, and *post*, p. 1142; and under 11 G. 2, c. 19, ss. 19, 21, where the goods have been seized as a distress for rent, *vide ante*, pp. 895, 899, 908.

As to what amounts to justification for killing the plaintiff's dog, see *Wright v. Ramscot*, 1 Wms. Saund. 84, and notes.

It is a defence that the goods have been previously recovered in an action of replevin brought for the same taking. *Gibbs v. Cruikshank*, L. R., 8 C. P. 454.

As to defence on the ground of the goods having been seized as a distress for trespass damage feasant, *vide sub tit. Replevin—Atowry for damage feasant, post*, pp. 1087, 1088.

ACTION FOR TRESPASS TO LAND.

This action does not lie in respect of land situated abroad. *Doulton v. Matthews*, 4 T. R. 503; *British S. Africa Co. v. Companhia de Moçambique*, (1893) A. C. 602, D. P.

Evidence of possession.] In order to maintain this action the plaintiff ought to have possession, actual or constructive. *Topham v. Dent*, 6 Bing. 516. Any possession is a legal possession as against a wrong-doer. *Graham v. Peat*, 1 East, 246; *Foster v. Warblington Urban, &c. Council*, (1906) 1 K. B. 648, C. A. A possession by the incumbent of a chapel and vestry erected under a Church Building Act, and vested in trustees, is sufficient to justify him in removing a trespasser from them. *Jackson v. Courtenay*, 8 E. & B. 8; 27 L. J., Q. B. 37. But a person who obtains possession by a trespass cannot maintain this action against the person whom he has dispossessed, and who forcibly reinstates himself. *Browne v. Dawson*, 12 Ad. & E. 624. A person occupying Crown lands under a parol licence has such a possession as entitles him to maintain trespass against a wrong-doer. *Harper v. Charlesworth*, 4 B. & C. 574. So persons exercising possessory rights over foreshore, have a title sufficient against a trespasser without producing evidence to displace the title of the Crown. *Hastings Cor. v. Ivall*, L. R., 19 Eq. 558. So, where overseers enclose waste land without consent of the lord of the manor, they may bring trespass against a mere stranger. *Matson v. Cooke*, 4 N. C. 392. So, if a tenant hold over after the expiration of his lease, or incur a forfeiture by committing waste or otherwise, yet if the landlord permit him to continue in actual possession, he may maintain trespass against any person entering upon him, and not having a better title than himself. *Harper v. Charlesworth*, 4 B. & C. 494, *per* Littledale, J.: Com. Dig. Trespass (B. 1). So, the outgoing tenant, who is entitled by custom to have, and to cut certain growing crops, and is obliged to keep up the fences until the cutting, has such a possession as to maintain or resist an action of trespass *qu. cl. fr.* *Griffiths v. Puleston*, 13 M. & W. 358. Possession by a servant is possession by the master, although the servant receives less wages by reason of being allowed to occupy the premises, and the master can maintain trespass; *Bertie v. Beaumont*, 16 East, 33; but it seems that the servant cannot. See *White v. Bailey*, *post*, p. 929. So a lodger cannot maintain trespass, for the possession is in the landlord. *Allan v. Liverpool*, L. R., 9 Q. B. 180, 191, 192, *per* Blackburn, J. See also *Monks v. Dykes*, *ante*, p. 915, *Bradley v. Baylis*, 8 Q. B. D. 195, 219, *per* Jessel, M.R.; and *Smith v. St. Michael, Cambridge*, 3 E. & E. 390, 391, *per* Cur.; and other cases cited *ante*, p. 905. The only remedy the lodger has against the landlord for disturbance of his occupation is for breach of contract in not allowing him to occupy his lodgings. *R. v. St. George's Union*, L. R., 7 Q. B. 90, 97, *per* Cockburn, C.J.

Persons who have merely a right to enter upon the *locus in quo* for the purpose of doing certain acts, cannot maintain trespass. Therefore commissioners of sewers under the statute of 23 H. 8, c. 5, have not such a possession of their works as will enable them to maintain trespass for breaking down a wall, or dam erected by them across a navigable river. *Newcastle, Dk. of v. Clark*, 8 Taunt. 602. So persons, who are merely authorized by parliament to make navigable a certain river, have no interest in the soil of a bank formed of the earth excavated from the channel of the river, so as to entitle them to support trespass for an injury to such bank. *Hollis v. Goldfinch*, 1 B. & C. 205. But, where certain private individuals contracted with the proprietors of a navigation to form a canal, and erected a dam of earth and

wood upon a close, with the permission of the owner, for the purpose of completing their work, it was held that they had a sufficient possession to support trespass against a wrong-doer. *Dyson v. Collick*, 5 B. & A. 603. An auctioneer who enters into possession of a house for the purpose of selling fixtures, cannot maintain trespass *qu. cl. fr.*; *Davis v. Danks*, 3 Exch. 435, *per Cur.* Plaintiff held a close by lease under tenant for life. Before the expiration of it by lapse of time, the tenant for life died. The plaintiff had before then locked the close up and left it unoccupied, but did not surrender it. Afterwards he took a fresh lease from the remainderman; but before he had entered under it the defendant committed a trespass: held, that the plaintiff could not bring an action of trespass; for his possession, in the absence of some act on his part, could not be presumed after it had ceased to be lawful, and he had not actually entered under the new lease. *Brown v. Notley*, 3 Exch. 219. The plaintiff, A., being owner of a house, agreed to a partnership with defendant B., to be carried on in part of A.'s house. The firm was to be charged with rent. The partnership continued from August to December, when it was ended by notice from A. to B.: held, that A. then had such an exclusive possession as entitled him to sue B. in trespass for entering afterwards; for B.'s interest ended with his partnership. *Benham v. Gray*, 5 C. B. 838. The plaintiff, as the manager, storekeeper, and agent of the defendants, a Swedenborgian society, became the occupier of a house of which the defendants were lessees; the defendants gave the plaintiff notice to quit the premises, and took possession of them: in an action of trespass brought by the plaintiff it was held that he occupied the premises merely as the servant of the defendants, and that the action was not maintainable. *White v. Bailey*, 10 C. B., N. S. 227; 30 L. J., C. P. 253. A mortgagor in possession, or A. to whom he let the land after the mortgage, cannot after the mortgage has become absolute, maintain trespass against the mortgagee, if the latter have not recognized them as *his* tenants. *Gibbs v. Cruikshank*, L. R., 8 C. P. 454. Though it would be otherwise where the lease was made under a power, *e.g.*, that given by 44 & 45 V. c. 41, s. 18 (1, 13), *cited post*, p. 1058.

The occasional possession of the key of a chapel in order to preach there is not sufficient to support trespass *qu. cl. fr.*; *Revett v. Brown*, 5 Bing. 7. The lay rector of a church cannot maintain trespass against the vicar, for removing a lock placed by the rector upon a door leading into the chancel. *Griffin v. Dighton*, 5 B. & S. 108; 33 L. J., Q. B. 181, Ex. Ch. But the owner of the freehold of a chapel aisle, or private or lesser chancel, though annexed to a church, may maintain trespass against the vicar, who has committed a similar act. *Chapman v. Jones*, L. R., 4 Ex. 273; *Norfolk, Dk. of v. Arbutnot*, 4 C. P. D. 290; 5 C. P. D. 390, C. A. See *Greenlade v. Darby*, L. R., 3 Q. B. 421. Immemorial repair and user of a lesser chancel, is evidence that a freehold of inheritance in it, is vested in those who have executed the repairs and exercised the acts of ownership. *Chapman v. Jones, Norfolk, Dk. of v. Arbutnot, supra.* Proof of the ownership of a several fishery on the foreshore is, even against the Crown evidence of the ownership of the soil. *A. G. v. Emerson*, (1891) A. C. 649, 654, 655, D. P.

Where the owner of the soil has divested himself of the exclusive possession of it, he may still bring this action. Thus, the owner of the soil of a street dedicated to the public, may maintain trespass for an injury to the freehold. *Lade v. Shepherd*, Str. 1004; *Doraston v. Payne*, 2 H. Bl. 527; 2 Smith's L. C.: see *Goodtitle d. Chester v. Alker*, 1 Burr. 133; *Every v. Smith*, 26 L. J., Ex. 344; and *post*, p. 942; so also the owner of a market; *Northampton, Mayor of v. Ward*, 1 Wils. 107. And even where another party has exclusive possession of the surface for certain months for the purpose of pasture, or (*ut semble*) has *prima vestura*, yet the freeholder retains sufficient

possession of the under-soil to support *trespass* for digging holes; but not for riding over it. *Cox v. Glue*, 5 C. B. 533. Where a lease reserves mines, and the right to work them, giving satisfaction for damage, the lessor has an absolute ownership of the mines, and not a mere easement, and the surface and minerals become separate estates, severed in title. *Hamilton, Dk. of v. Graham*, L. R. 2 H. L. Sc. 166. In *Lonsdale, El. of v. Rigg*, 1 H. & N. 924; 26 L. J., Ex. 196, it was held that the lord of a manor might bring an action of trespass against the owner of a cattle-gate for taking and killing grouse; the "cattle-gate" there appearing to be an hereditary, customary tenement, holden of the lord by fines for admittance, quit rents, and suits of court, but entitling to rights only in the nature of commonable rights.

Where A. brought an action of ejectment against B., he thereby admitted B.'s possession of the land. *Stanford v. Hurlstone*, L. R., 9 Ch. 116.

Evidence of possession—property in the soil not necessary.] We have seen that an interest in the soil, without an exclusive use of it, is enough to support trespass. On the other hand, exclusive possession, without property or interest in the soil, is also sufficient for this action. Thus, one who has the herbage, Co. Litt. 4 b.; *Welden v. Bridgewater*, Cro. Eliz. 421; Vin. Ab. Tres. (H. 1); or, the pasture or pasture of a close, Co. Litt. 4 b.; *Parker v. Staniland*, 11 East, 366; *Evans v. Roberts*, 5 B. & C. 837; Vin. Ab. Tres. (H. 2); may maintain trespass: but it is otherwise, if the right be not an exclusive one, *Coverdale v. Charlton*, 4 Q. B. D. 104, C. A. A person entitled to the exclusive enjoyment of a crop, growing on land, during the proper period of its full growth, and until it be cut and carried away, may in respect of such exclusive possession, maintain trespass. *Crosby v. Wadsworth*, 6 East, 609, per Ld. Ellenborough, C.J.; *Tompkinson v. Russell*, 9 Price, 287. So, where a person has an exclusive right of digging turves: *Wilson v. Macreth*, 3 Burr. 1824; or, a grant of underwood. *Hoe v. Taylor*, Cro. Eliz. 413. So, the owner of a free warren in *alieno solo*, for breaking his free warren; *Dacre, Id. v. Tebb*, 2 W. Bl. 1151; *Carmarvon, El. of v. Villebois*, 13 M. & W. 313; but not for breaking his close; 5 H. 7, f. 10, pl. 2, cited *Welden v. Bridgewater, supra*. The owner of a "several" fishery, even in the soil of another, may maintain trespass, though no fish are taken. *Holford v. Bailey*, 8 Q. B. 1000. But, not the owner of a "sole and exclusive" fishery, except in cases where those words import a several fishery, which after verdict they will be assumed to do. S. C., 13 Q. B. 426, Ex. Ch. And see *Marshall v. Ulleswater S. Navigation Co.*, 3 B. & S. 732; 32 L. J., Q. B. 139. Where a meadow is divided annually amongst certain persons by lot, after their several portions are allotted, each has an exclusive possession and may maintain trespass. *Welden v. Bridgewater, supra*; Co. Litt. 4 a, 48 b; *Cox v. Glue*, 5 C. B. 533, 552. A copyholder has such a possession of the mines under his land, as to maintain trespass against a stranger for taking coals though there be no entry on, or injury to, the surface. *Lewis v. Branthwaite*, 2 B. & Ad. 437. See *Eardley v. Granville*, 3 Ch. D. 826.

If the possession be not an exclusive one, as of common of turbary; *Wilson v. Macreth*, 3 Burr. 1826; or, a mere easement arising from the ownership of land; *Mainwaring v. Giles*, 5 B. & A. 361; case, and not trespass *qu. cl. fr.*, is the proper remedy.

Evidence of possession—actual and immediate.] It must appear that the plaintiff was in the actual and immediate possession of the *locus in quo* when the trespass was committed. Therefore an heir before entry who has only a seisin in law, cannot maintain trespass. Com. Dig. Trespass (B. 3). Nor, a bargainee before entry; *Id.*; *Barker v. Keat*, 2 Mod. 251; but see *Anon.*, Cro. Eliz. 46. Neither, the conusee of a fine; *Berry v. Goodman*, 2 Leon.

147, *arg.*; nor, a devisee, *Auon.*, 2 Mod. 7; *Geary v. Bearcroft*, Bridgm. Judgm. 495; nor, a surrenderee, Bro. Abr. Surr. 50; nor, a reversioner after the expiration of an estate for life or years, Keilw. 163 a; Com. Dig. Trespass (B. 3); nor, a lessee for years, Keilw. 163 a; Bac. Ab. Leases (M.); *Ryan v. Clark*, 14 Q. B. 65, 73, *per* Patteson, J.; *Wallis v. Hands*, (1893) 2 Ch. 75; nor, the assignee of a term; *Harrison v. Blackburn*, 17 C. B., N.S. 678; 34 L. J., C. P. 109; can bring trespass before entry. Therefore, a mortgagee, by demise for years, cannot bring trespass against a stranger before entry; *Wheeler v. Montefiore*, 2 Q. B. 133; *Turner v. Cameron's Coalbrook Co.*, 5 Exch. 932; nor, a parson before induction. *Hare v. Bickley*, Plowd. 528. But, after induction, he may maintain trespass for an injury to the glebe lands, although he has not made an actual entry upon the part on which the trespass was committed; for the act of induction puts him into possession of part for the whole. *Bulwer v. Bulwer*, 2 B. & A. 470. By the J. Act, 1873, s. 25, (5) (*ante*, p. 307), a mortgagor entitled to the possession of land may maintain trespass in his own name, if his mortgagee has not given notice of his intention to enter into possession of the land, or of the receipts and profits thereof. But, this enactment does not apparently alter the previous law. On the determination of a lease at will, by the death of the lessee, the lessor may maintain trespass before entry. Co. Litt. 62 b.; *Geary v. Bearcroft*, 1 Lev. 202. And, there are authorities to show that, where land is let at will and a trespass is done on the land, both the lessor and lessee may maintain trespass. *Harper v. Charlesworth*, 4 B. & C. 583, *per* Holroyd, J.; 2 Roll. Ab. 551, l. 49; Com. Dig. Tresp. (B. 2); *Geary v. Bearcroft*, Bridgman's Judgm. 496, n. If a lessee at will commit voluntary waste, the lessor may immediately maintain trespass against him; for the committing of waste amounts to a determination of the will. *Shrewsbury's, Ly., case*, 5 Rep. 13 b; Co. Litt. 57 a. Where trees are excepted in a lease the lessor may maintain trespass *qu. cl. fr.* against any one who cuts them down; for by the exception of the trees, the close on which they grow is excepted also. *Ashmead v. Ranger*, 1 Ld. Raym. 552; *Rolls v. Rock*, 2 Selw. N. P., 13th ed., 1244. Actual possession at the time of the trespass done is sufficient; it is not necessary that the plaintiff should be in possession at the time of action brought. 2 Roll. Ab. 569, l. 20. A reversioner cannot obtain an injunction, to restrain a trespass, which is not an injury to the reversion. *Cooper v. Crabtree*, 20 Ch. D. 589, C. A.

Evidence of possession by relation.] Although to maintain this action the plaintiff must have the immediate possession at the time of the injury, yet there are some cases in which, by the doctrine of relation, the plaintiff is allowed to recover for trespasses committed at a period when he was not in fact in possession. Thus, a disseisee who re-entered, revested the possession in himself *ab initio*, and might have trespass against the disseisor, or a stranger, for any act of trespass committed between the disseisin and the re-entry; 2 Roll. Abr. 550, l. 7, 554, l. 39; Co. Litt. 257 a; or, against the disseisor for continuing in possession. *Butcher v. Butcher*, 7 B. & C. 399; *Litchfield v. Ready*, 5 Exch. 939. The entry of an heir relates back to the time of the right of entry, so as to support an action against a wrongdoer for a trespass committed, after the accrual of the right, and before actual entry; *Barnett v. Guildford*, *El. of*, 11 Exch. 19; 24 L. J., Ex. 281; so does the entry of the assignee of a lease; *Anderson v. Radcliffe*, E. B. & E. 806; 29 L. J., Q. B. 128, Ex. Ch.; or of a mortgagee; *Ocean Accident, &c. Cor. v. Ilford Gas Co.*, (1905) 2 K. B. 493, C. A.; even in the case of a second mortgage where the first mortgagee has not intervened. S. C. The action of trespass for mesne profits affords another instance of the doctrine of relation. See that title, *post*, p. 945.

By stat. 6 A., c. 72 (c. 18 in Ruff.), s. 5, guardians, trustees, husbands seized *jure uxoris*, and tenants *pur autre vie*, holding over without consent, are declared trespassers, and made liable to the parties entitled, for the profits from the expiration of their interests.

Evidence of the ownership of roads, wastes, rivers, walls, ditches, &c.] The soil of a highway or occupation road is presumed to belong to the owner of the adjoining inclosed land, *usque ad medium filum*; but the presumption may be rebutted by acts of ownership, &c. *Holmes v. Bellingham*, 7 C. B., N. S. 329; 29 L. J., C. P. 132; *Beckett v. Leeds Cor.*, L. R., 7 Ch. 421; *Harrison v. Rutland, Duke of*, (1893) 1 Q. B. 142, C. A. The presumption applies although the close conveyed, is set out by admeasurement, and referred to as "all the land coloured red" on a plan annexed to the conveyance. *Berridge v. Ward*, 10 C. B., N. S. 400; 30 L. J., C. P. 218. The rule is the same whether the adjoining land be freehold, copyhold, or leasehold. *Doe d. Pring v. Pearsey*, 7 B. & C. 304; *Doe d. Barrett v. Kemp*, 2 N. C. 102 Ex. Ch.; *Haynes v. King*, (1893) 3 Ch. 439. It applies to streets in a town. S. C.; *In White's Charities*, (1898) 1 Ch. 659; *L. & N. W. Ry. Co. v. Westminster Cor.*, (1902) 1 Ch. 269. See S. C., (1904) 1 Ch. 759, C. A.; (1905) A. C. 426, 428, 440, D. P. The presumption does not apply to adjoining land, intended to be used as a highway, but not yet dedicated to the public. *Leigh v. Jack*, 5 Ex. D. 264, C. A. And the soil will not pass where it appears from the circumstances at the time of the grant that such was not the intention. See *Micklethwait v. Newlay Bridge Co.*, 33 Ch. D. 133, C. A.; *Beckett v. Leeds Cor.*, L. R., 7 Ch. 424, *per James, L.J.* Thus, where after a turnpike road and two pieces of land adjoining had been separately numbered in certain deposited plans, a conveyance of the two pieces of land specified their numbers, but omitted all mention of the number which had been applied to the road; it was held, that there was a presumption that the latter had not been included in the conveyance. *Salisbury, Mqs. of v. Gt. N. Ry. Co.*, 5 C. B., N. S. 164; 28 L. J., C. P. 40; *Plumstead B. of Works v. British Land Co.*, L. R. 10 Q. B. 16 (no opinion given on this point in Ex. Ch., *Id.* 203); *Pryor v. Petre*, (1894) 2 Ch. 11, C. A. See *Mappin Bros. v. Liberty & Co.*, (1903) 1 Ch. 118. See further as to the presumption of ownership, the cases with reference to rivers, *post*, p. 933. The presumption as to the ownership of strips of waste land adjoining the highway is the same as that in respect of the highway itself. *Steel v. Prickett*, 2 Stark. 468. If the strip be contiguous to, or communicate with, open commons or larger portions of open land, the presumption is either rebutted or considerably narrowed; for then the evidence of ownership, which applies to the larger portions, applies also to the narrow strip which communicates with them. *Grose v. West*, 7 Taunt. 39; *Headlam v. Hedley*, Holt, N. P. 463. And, where the strip was claimed as part of the adjacent glebe, proof of inclosure of other portions of the same strip under titles adverse to the rector, was held admissible to rebut the presumption. *Doe d. Harrison v. Hampson*, 4 C. B. 267. Upon a question whether a piece of waste land lying between a highway and the plaintiff's enclosed land, belonged to the plaintiff, or to the lord of the manor, it was held, that grants by the lord of other slips of waste land on either side of the same road, abutting on inclosed lands of the lord himself, and of other persons, were admissible for the purpose of showing that the *locus in quo* was part of the waste of the manor, without showing continuity. *Dendy v. Simpson*, 18 C. B. 831. If two lessees of the same lord of the manor lay claim to the strip as included in their respective demises, no presumption is said to exist in favour of the lessee whose land it adjoins. *White v. Hill*, 6 Q. B. 487. And, where a road through common land is set out by commissioners under an inclosure act, it is doubtful whether the usual presumption as to the right of the owners of the adjoining

land applies. *R. v. Edmonton*, 1 M. & Rob. 32; see also *R. v. Wright*, 3 B. & Ad. 681. And, it seems that where the herbage of a road is vested by the Inclosure (Consolidation) Act, 1801 (41 G. 3, c. 109), in the owners of the adjacent allotments, no presumption arises that the soil itself belongs to them. *R. v. Hatfield*, 4 Ad. & E. 156. See also 2 Smith's L. C., 11th ed., pp. 164 *et seq.*

Under the Metropolitan Management Act, 1855, (18 & 19 V. c. 120) s. 96, "streets being highways, and the pavements, stones and other materials thereof," are vested in the vestry of district board. This, however, applies to the surface only, of the street; *Hackney Board of Works v. Gt. E. Ry.*, 8 Ap. Ca. 687, 692, *per* Id. Watson; *Battersea Vestry v. County of London, &c. Lighting Co.*, (1899) 1 Ch. 474, C. A., following *Tunbridge Wells, Mayor of v. Baird*, *infra*, and for so long only, as the street remains such; if it be closed, the surface reverts in the person, who would have remained owner, but for sect. 96. *Rolls v. St. George, Southwark*, 14 Ch. D. 785, C. A. And the district board cannot prevent wires being placed across the street, at such a height above it, as not to interfere with the traffic. *Wandsworth District Board of Works v. United Telephone Co.*, 13 Q. B. D. 904, C. A.; nor at a depth of 2 feet below it. *Battersea Vestry v. County of London, &c. Lighting Co.*, *supra*. By the London Government Act, 1899 (62 & 63 V. c. 14), s. 4, the powers and duties of these metropolitan vestries and district boards have been transferred to the new metropolitan boroughs created by the act. The Public Health Act, 1875, (38 & 39 V. c. 55), s. 149, is similar in its terms, to 18 & 19 V. c. 120, s. 96, *supra*, and vests in the urban authority the street, and also the pasturage at the sides of the street; *Coverdale v. Charlton*, 4 Q. B. D. 104, C. A. But not the subsoil below the street; *Tunbridge Wells, Mayor of v. Baird*, (1896) A. C. 434, D. P.; even although the street was formerly owned in fee by turnpike trustees, for the title prior to the vesting is immaterial. *Finchley Electric Light Co. v. Finchley Urban Council*, C. A., *infra*. The Local Govt. Act, 1888, s. 11 (6), vests main roads and the materials thereof, except where the urban authority retain the duty of repairing such road, in the County Council. Strips of grass, however, bordering the metalled part of the road, do not so vest. *Curtis v. Kesteven County Council*, 45 Ch. D. 504. The vesting under the above section is limited to the area of user, *i.e.* "all the stratum of air above the surface, and all the stratum of soil below the surface, which in any reasonable sense can be required for the purposes of the street, as street, vest in and belong to the local authority." *Finchley Electric Light Co. v. Finchley Urban District Council*, (1903) 1 Ch. 437, 441, *per* Collins, M.R. Where the road so vests in a public body they may remove encroachments without having taken any legal proceedings. *Reynolds v. Presteign Urban District Council*, (1896) 1 Q. B. 604.

Fresh rivers of common right belong to the owners of the soil adjacent, so that the owners of each side are presumed to have the property of the soil and the right of fishing *usque ad medium filum aquæ*. *Bickett v. Morris*, 1 L. R., 1 H. L. Sc. 47; *Edleston v. Crossley*, 18 L. T. 15, Feb. 1868, Wood, V.-C. A crown grant of land describing it as bounded by a (fresh-water) creek or river, presumably includes half the soil of it, *ad medium filum aquæ*. *Lord v. Sydney, City of*, 12 Moo. P. C. 473. So in the case of a private grant, even although the land which is expressed to be granted is described as coloured pink, and its acreage stated. *Micklethwait v. Newlay Bridge Co.*, 33 Ch. D. 133, C. A. And whether its tenure be freehold, copyhold, or leasehold. *Tilbury v. Silva*, 45 Ch. D. 98, 109, *per* Kay, J.; *Dwyer v. Rich*, Ir. R. 6 C. L. 144, Ex. Ch. It may, however, be shown from the surrounding circumstances that the soil of the river did not pass by the grant. *Devonshire, Dk. of v. Pattinson*, 20 Q. B. D. 263, C. A. See further the cases on roads,

ante, p. 932. The presumption does not extend to the ownership of half an ancient island in the middle of the river. *Gt. Torrington, &c. Conservators v. Moore Stevens*, (1904) 1 Ch. 347. If a man is owner of the land on both sides, by common presumption he is owner of the whole river. Hale, *de Jure Maris*. Harg. Law Tracts, 5. Where two parishes are separated by a river, the *medium filum* is the presumption boundary between them. *R. v. Landulph*, 1 M. & Rob. 393. The shore is presumably extra-parochial. *R. v. Musson*, 8 E. & B. 900; 27 L. J., M. C. 100; so is the shore of a tidal river. *Bridgewater Trustees v. Bootle cum-Linacre*, L. R., 2 Q. B. 4. But for civil parochial purposes this is now altered by 31 & 32 V. c. 122, s. 27. Proof that the annual parish perambulations proceeded along the banks and shore of a public navigable river, the neighbouring parishes along the same shore having always included the *medium filum* in their perambulations, is evidence that the *medium filum* is the boundary throughout. *McCannon v. Sinclair*, 2 E. & E. 53; 28 L. J., M. C. 247. As to the effect of a grant of land "bounded by the seashore," see *Mellor v. Walmsley*, (1905) 2 Ch. 164, C. A.

A wall has been said to differ in point of ownership from a bank; being an artificial edifice, the property is presumed to be in him who is bound to repair it; while the property in a bank follows that of the soil from which it is constructed. Callis on Sewers, 4th ed. 74; see *Newcastle, Dk. of v. Clark*, 8 Taunt. 602, *per Cur.* Where no such liability or act of ownership is shown, a wall, as well as a bank, presumably follows the property of the soil. If two tenants in severalty build a party-wall, one-half of the thickness of which stands on the land of each (contributed under the old Metropolitan Building Act, 14 G. 3, c. 78), the property in the wall follows the property in the land, and the owners of the land are not tenants in common of the wall, but tenants of divided moieties. *Matts v. Hawkins*, 5 Taunt. 20; see *Murly v. McDermott*, 8 Ad. & E. 138. But, in a case to which the Building Act does not apply, and where there is no distinct proof of exclusive property as to the whole or part, the common user of a wall separating adjoining lands, belonging to different owners is *primâ facie* evidence that the wall, and the land on which it stands, belongs to the owners of the adjoining land in equal undivided moieties as tenants in common. *Cubitt v. Porter*, 8 B. & C. 257; see *Standard Bank of British S. America v. Stokes*, 9 Ch. D. 69; *Watson v. Gray*, 14 Ch. D. 192. A wall may be a party-wall for such part of its height or length as belongs in common to two buildings, and not for the remainder of it. *Weston v. Arnold*, L. R., 8 Ch. 1084; *Knight v. Pursell*, 11 Ch. D. 412. On appeal in S. C. to the C. A., the defendant disclaimed the right to treat any part of the wall as a party-wall, and the question was not argued. (1880) W. N. 104, T. S. As to the dividing line of a house, granted as being "in the occupation of A. B.," see *Fox v. Clarke*, L. R. 9 Q. B. 565, Ex. Ch. As to ownership of the column of air over a room belonging to A. which projects over the land of B., see *Corbett v. Hill*, L. R., 9 Eq. 671.

Where A. licensed B. to build a bridge on his (A.'s) land, and B. covenanted to repair it, it was held that the property in the materials of the bridge, when built and dedicated to the public, continued in B., subject to the right of passage by the public; and, that when severed and taken away by a wrong-doer, B. might obtain trespass for the asportation. *Harrison v. Parker*, 6 East, 154; see *Spooner v. Brewster*, 3 Bing. 136.

The rule with regard to the presumptive ownership of hedges and ditches has been thus stated: where two adjacent fields are separated by a hedge and ditch, the hedge *primâ facie* belongs to the owner of the field in which the ditch is not. If there be two ditches, one on each side of the hedge, then the ownership of the hedge must be shown by proving acts of ownership. *Guy*

v. *West*, 2 Selw. N. P., 13th ed., 1244. No man making a ditch can cut into his neighbour's soil, but usually he cuts to the extremity of his own land; he is, of course, bound to throw the soil which he digs out upon his own land; therefore, if he afterwards cut beyond the edge of the ditch, he cuts into his neighbour's land, and is a trespasser. *Fowles v. Miller*, 3 Taunt. 138. The land which constitutes the ditch is therefore part of the close on the other side of the bank. *Per Holroyd, J., Doe d. Pring v. Pearsey*, 7 B. & C. 398. It is doubtful if this presumption extends to a natural watercourse; see *Marshall v. Taylor*, (1895) 1 Ch. 641.

It is said that if A. plant a tree at the extreme limit of his own land, and it extend its roots into the land of B., A. and B. are tenants in common of the tree; but if all the roots grow in A.'s land, though the boughs shadow the land of B., the property is in A. *Per Holt, C.J., Waterman v. Soper*, 1 Ld. Raym. 737; B. N. P. 85; 2 Roll. Rep. 255. According to another authority, if a tree grows in A.'s close, and its roots in B.'s, yet the body or the main part of the tree being in the soil of A., all the residue of the tree belongs to him. *Masters v. Pollie*, 2 Roll. Rep. 141. In a like case, *Littledale, J.*, ruled, that the tree belongs to him in whose soil it was first sown or planted. *Holder v. Coates*, M. & M. 112; and see *Id. n.* The property in trees is in the landlord; the property in bushes even where they have been cut down by a stranger, in the tenant: therefore the landlord cannot trespass *de bonis*, &c., to recover the cuttings of the latter. *Berriman v. Peacock*, 9 Bing. 384.

As to presumptive evidence of ownership, *vide ante*, p. 38.

[*Acts of ownership.*] The proof of ownership by documentary and other assertions of right is treated of *ante*, pp. 53, 54. Cutting down or planting trees is evidence of right to the soil. Vin. Ab. Ev. (T. b. 102); *S. Leonards, Ld. v. Ashburner*, 21 L. T. 595, *eor. Bramwell, B.* So are the erection and maintenance on the foreshore of fixed nets, called kiddells. *A.-G. v. Emerson*, (1891) A. C. 649, 656—60. See further as to proof of possession of the soil by acts of user, cases cited *post*, pp. 998, 999, *sub tit. Action for recovery of land.* A perambulation made by the lord is evidence of the limits of a manor, and it is not necessary that any person against whom it operates should be present at or know of it. *Woolway v. Rowe*, 1 Ad. & E. 114. Generally any act done upon the land is admissible evidence. *Id.* 117. And, such acts are not evidence on the ground of acquiescence, but as showing possession. *Per Parke, B., in Jones v. Williams*, 2 M. & W. 328. The acts of tenants may be evidence against their reversioners, where their declarations are not. *Tickle v. Brown*, 4 Ad. & E. 369. And, acts in one place may be evidence of ownership in another, where there is a common character of locality: thus, cutting timber in a wood or close, is evidence of title to the whole wood or close; so of a continuous hedge, or different parts of the bed of a river, &c. *Jones v. Williams*, 2 M. & W. 326; *Neill v. Devonshire, Dk. of*, 8 Ap. Ca. 135, D. P.; *Hanbury v. Jenkins*, (1901) 2 Ch. 401, 417. See further *ante*, pp. 85, 86.

Where the surface and the minerals are several inheritances (as is common in mining districts), the user or ownership of one is no evidence of property in the other. *Rowe v. Grenfel*, Ry. & M. 396; *Rich d. Ld. Cullen v. Johnson*, Str. 1142; *Hodgkinson v. Fletcher*, 3 Doug. 31. Working in one part of a mine is possession of the whole. *Wild v. Holt*, 9 M. & W. 672. So, working under part of a demised tract of land is evidence of the possession of mines under the whole tract. *Taylor v. Parry*, 1 M. & Gr. 604.

[*Situation of the premises.*] The close on which it is alleged that the

trespass was committed should be described with reasonable certainty by name, abutments or other description, so that the defendant may know what close is intended. The close should be described as it stood at the time of the trespass. *Humphrey v. L. & N. W. Ry. Co.*, 7 Exch. 325. But, in case of a misdescription, an amendment will be allowed at N. P. on the merits. *Vide ante*, pp. 291 *et seq.*

Evidence of trespass committed by defendant.] If the landlord, who has let apartments to the plaintiff, exclude him from the house and remove his name from the outer door, this is evidence of a trespass committed by breaking and entering the apartments. *Lane v. Dixon*, 3 C. B. 776. In this case no objection was taken as to the possession of the plaintiff being insufficient to maintain trespass. *Vide ante*, p. 928.

It is a trespass to place anything against the plaintiff's wall; *Gregory v. Piper*, 9 B. & C. 591; or, to shoot into the plaintiff's land. *Pickering v. Rudd*, 1 Stark. 56, 58. *Ld. Ellenborough, C.J.*, seems to have regarded it as uncertain how far trespass would lie for shooting over, or placing anything so as to overhang, the plaintiff's land; S. C. But trespass will lie for carrying minerals through a tunnel, 500 yards below the surface of the plaintiff's land, and not used by him. *Eardley v. Granville*, 3 Ch. D. 826.

Trespass lies against a tenant in common with the plaintiff for destroying a common wall; *Cubitt v. Porter*, 8 B. & C. 257; or, for using it so as to exclude the plaintiff; *Stedman v. Smith*, 8 E. & B. 1; 26 L. J., Q. B. 314; but, not for pulling it down with intent to rebuild it, or for raising its height. *Cubitt v. Porter, supra*. See also *Watson v. Gray*, 14 Ch. D. 192. And it lies against him or his licensee for digging peat or turf, and carrying it away for his own use. *Wilkinson v. Haygarth*, 12 Q. B. 837. And, for actual expulsion. *Murray v. Hall*, 7 C. B. 441. But, it does not lie if he take away the whole profits of the land. *Jacobs v. Seward*, L. R., 4 C. P. 328; L. R., 5 H. L. 464. The rights of the owners of a party wall within the limits of the Metropolitan Building Act, 1855, were regulated by that Act. *Standard Bank of British S. America v. Stokes*, 9 Ch. D. 68. This act has been replaced by the London Building Act, 1894, 57 & 58 V. cap. cexiii.

Trespass lies against the party who did the trespass and all aiding him; Com. Dig. Tresp. (C. 1); and, a person may become a trespasser by previous command, or, where the trespass has been committed for his use and benefit, by subsequent assent. *Barker v. Braham*, 3 Wils. 377. But, in cases of subsequent assent, it must appear that the trespass was for his use. *Wilson v. Barker*, 4 B. & Ad. 614. See *ante*, p. 926. An infant cannot make himself a trespasser, either by prior command or subsequent assent. Co. Litt. 180 b (4); *Id.* 357 b. The same rule formerly prevailed as to a *feme covert*; *Id.*; but under the Married Women's Property Act, 1882, s. 1 (2), *post*, pp. 1175, 1176, she may, it seems, to the extent of her separate property, render herself liable by ratification.

A master is not liable for the *wilful* trespass of his servant. 2 Roll. Ab. 553, 1. 25; *Chandler v. Broughton*, 1 Cr. & M. 29. But, where he orders his servant to do an act, the natural consequence of which is a trespass, and the servant uses ordinary care in the execution of the order, the master is liable, though he direct the servant not to trespass. *Gregory v. Piper, supra*. See, on the liability of a master for the acts of his servants, *ante*, pp. 774 *et seq.* A party is liable for the acts of his solicitor on proof of retainer; thus, A. employed B., an attorney, to enforce payment of a debt; B. directed his agent to sue out a *justicies* in the county court; before the return of the *justicies* the debtor paid the debt, and costs, to B.; his agent, not knowing of such payment, afterwards entered up judgment and sued out execution, under

which the trespass was committed: held, that both A. and B. were liable as trespassers. *Bates v. Pilling*, 6 B. & C. 38. See also *Crook v. Wright*, Ry. & M. 278. A solicitor who, as such, misleads the sheriff, by indorsing on a writ of execution a direction, by which the sheriff is induced to seize the goods of a wrong party, is liable in trespass. *Roules v. Senior*, 8 Q. B. 677; *Stratten v. Lawless*, 14 Ir. C. L. R. 432. And the judgment creditor is also liable. *Jurmain v. Hooper*, 6 M. & G. 827; *Morris v. Salberg*, 22 Q. B. D. 614, C. A. But, where the solicitor delivers a writ of execution to an officer, who executes it by entering a house out of the jurisdiction, the solicitor is not liable, though he may have had reason to believe it would be so executed. *Sorvell v. Champion*, 6 Ad. & E. 407. See further as to the liability of the judgment creditor for a wrongful seizure, *ante*, p. 926; and as to the liability of solicitor, principal, and sheriff respectively, acting under process which is either void or irregular, *ante*, p. 916. As to the liability of a landlord, and of his agent who signed the distress warrant for the wrongful acts of the bailiff employed to distrain, *vide ante*, pp. 908, 909. Where a highway board ordered their surveyor, A., to remove an obstruction to an alleged highway across the plaintiff's land, such order not being within the powers conferred on them by the 25 & 26 V. c. 61, under which they were incorporated, it was held that A. and all the members of the board, who voted in favour of the order, were liable to an action of trespass for the entry by A. in consequence of the order; *Mill v. Hawker*, L. R., 9 Ex. 309; on appeal, however, the Ex. Ch. held that the surveyor A. was liable, but gave no decision as to the liability of the members of the board. S. C., L. R., 10 Ex. 92.

The head, G., of an executive department of the government, is not liable for the wrongful acts of the officials under him, unless the act was substantially that of G. himself; those only who commit or authorize the acts are liable, and the authority of the department affords them no justification. *Raleigh v. Goschen*, (1898) 1 Ch. 73; *Bainbridge v. Postmaster-Gen.*, (1906) 1 K. B. 178, C. A.

The owner of animals *mansuetæ naturæ*, such as oxen, &c., is liable for trespasses committed by them in the land of another. Keilw. 3 b; Com. Dig. Tresp. (C.); *Ellis v. Loftus Iron Co.*, L. R., 10 C. P. 10; see also, *Lee v. Riley*, 18 C. B., N. S. 722; 34 L. J., C. P. 212, cited *ante*, p. 790. But where such animals, while being driven along a highway, stray on adjoining land, through defect of fences, their owner is not liable, if he remove them within a time, that is reasonable, under all the circumstances. *Goodwyn v. Cheveley*, 28 L. J., Ex. 298. So, if without negligence of the owner they stray into a shop adjoining the street, along which they are driven, he is not liable. *Tillett v. Ward*, 10 Q. B. D. 17. As to unauthorized entries of domestic cats and dogs, see *Read v. Edwards*, 17 C. B., N. S. 245; 34 L. J., C. P. 31. The distress of an animal damage feasant is, so long as the distress is retained, a defence to an action of trespass for the same damage. *Vaspor v. Edwards*, 12 Mod. 658; *Boden v. Roscoe*, (1894) 1 Q. B. 608. A person, from whose land animals *feræ naturæ*, as rabbits, &c., escape, is not liable for such injury. *Boulston's case*, 5 Rep. 104 b; *Cooper v. Marshall*, 1 Burr. 259; *Beekwith v. Shordike*, 4 Burr. 2093. See further, *ante*, pp. 789 *et seq.* An action will not lie against a person, entitled to enter on the land, for forcibly taking possession thereof, contrary to stat. 5 R. 2, stat. 1, c. 7 (c. 8, Ruff.). *Beddall v. Maitland*, 17 Ch. D. 174.

Trespass ab initio.] Where the defendant enters under an authority *in law*, the plaintiff may show that he has abused such authority and so become a trespasser *ab initio*; but a mere non-feasance will not be such an abuse; nor does the subsequent abuse of an authority *in fact* (as a licence) make a trespass *ab initio*. *Six Carpenters' case*, 8 Rep. 146 a. The distinction is

said to be founded on a presumed intention, *ab initio*, to abuse the authority given by the law, and not by the act of the party; but, it seems to be founded rather on the necessity of a more stringent protection against the abuse of powers given by law; whereas, those who voluntarily give powers can limit or recall them as they please. A lessor who enters to view waste, and does damage, or, stays all night; a commoner who enters to view his cattle, and cuts down a tree; a man who enters a tavern, and continues there all night against the will of the landlord;—are all trespassers *ab initio*. Com. Dig. Tresp. (C. 2). So is an officer of a court who neglects to remove goods attached, within a reasonable time, and continues on the premises in possession. *Reed v. Harrison*, 2 W. Bl. 1218; *Aitkenhead v. Blades*, 5 Taunt. 198. See also *Ladd v. Thomas*, 12 A. & E. 117. So the abuse of a distress made a trespass *ab initio* at common law; but the stat. 11 G. 2, c. 19, s. 19, provides that no “unlawful act” afterwards done by the distrainer shall make the distress for rent actually due unlawful, or the distrainer a trespasser *ab initio*; *ante*, p. 896. The stat. 17 G. 2, c. 38, s. 8, contains similar provisions in the case of a distress for poor rate due. In the case of an illegal distress, however, the statute affords no defence, and the distrainer is a trespasser *ab initio*. See further, *Action for illegal distress*, *ante*, pp. 899 *et seq.*

The authority of process is, it seems, an authority in law within the rule. See *Reed v. Harrison*, *supra*, which was the case of a bailiff of an inferior court, who was in the nature of a sheriff. Com. Dig. Tresp. (C. 2). But, an irregularity of the sheriff or officer of a superior court will not necessarily make his act a trespass *ab initio*. Thus, if he illegally break a door, or execute a writ on Sunday, yet the execution may be valid. *Percival v. Stamp*. 9 Exch. 167; 23 L. J., Ex. 25. So, a detention under an attachment beyond the proper time does not make the attachment by the sheriff wholly illegal. *Smith v. Egginton*, 7 Ad. & E. 167.

When the plaintiff relies on an act which makes the defendant a trespasser *ab initio*, he must reply to it specially; but where the abuse is a substantive trespass, but not one which makes a trespass *ab initio*, it must formerly have been newly assigned; 1 Wms. Saund. 300 *h*, (g); 1 Smith’s L. C., 6th ed., 137, 138; *Smith v. Egginton*, *supra*, and may now be raised by way of amendment of the claim, or by reply, *vide ante*, p. 310.

Damages—Injunction.] In trespass for breaking and entering the plaintiff’s house, evidence that the defendant at the same time debauched the plaintiff’s daughter has been allowed, under *alia enormia*; *per* Holt, C.J., *Russel v. Corn*, 6 Mod. 127; Cas. temp. Holt, 699; B. N. P. 89. And as such an act cannot be treated as special damage, and is not necessarily actionable in itself, it seems properly matter of aggravation, and was so treated in *Cock v. Wortham*, 2 Selw. N. P., 2nd ed., 1085. But it seems clear that such matters must now be specially pleaded. Rules, 1883, O. xix., rr. 15, 17, *ante*, p. 309. The plaintiff may prove that his wife was so terrified at the trespass that she was immediately taken ill, and soon afterwards died; but this evidence was held admissible for the purpose only of showing how outrageous and violent the trespass was, and not as a substantive ground of damage. *Huxley v. Berg*, 1 Stark. 98. Where the plaintiff declared for breaking and entering her house, and, under a false charge that she had stolen property in it, ransacking and searching, &c.; whereby she was injured in her credit, it was held that the jury might give damages for the trespass as aggravated by the false charge. *Bracegirdle v. Orford*, 2 M. & S. 77. The jury may consider not only the pecuniary damage sustained, but also the intention with which the act has been done, whether for insult or injury. *Per* Abbott, J., *Scars v. Lyons*, 2 Stark. 318; *Merest v. Harvey*, 5 Taunt.

442; see also *Emblen v. Myers*, 6 H. & N. 54; 30 L. J., Ex. 71; *Bell v. Midland Ry. Co.*, 10 C. B., N. S. 287; 30 L. J., C. P. 273. For the continuance of an obstruction placed by the defendant on the plaintiff's land, a fresh action of trespass may be brought *de die in diem*, and to such actions recovery in a former action is no defence. *Holmes v. Wilson*, 10 Ad. & E. 503; *Bowyer v. Cook*, 4 C. B. 236. By O. xxxvi., r. 58, "Where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of the assessment." See hereon *ante*, pp. 295, 771.

In trespass for cutting away part of the plaintiff's land, the defendant is bound to pay the value of the land so cut away, but not the expense of reinstating it; for this may be more than the land was ever worth. *Jones v. Gooday*, 8 M. & W. 146; see also *Whitham v. Kershaw*, 16 Q. B. D. 613, C. A. If a house is pulled down by the defendant, the damages are measured by the reduction in the selling value of the land. *Semb.*, *Hosking v. Phillips*, 3 Exch. 168; *ante*, p. 771. In trespass for breaking a mine and taking the plaintiff's coal, the plaintiff is entitled as against a mere wrong-doer, to the value of the coal when it first existed as a chattel, without deducting the expense of getting it. *Wild v. Holt*, 9 M. & W. 672. But, the expense of afterwards bringing it to the pit's mouth must be allowed; for the plaintiff cannot profit by the increased value caused by the removal. *Morgan v. Powell*, 3 Q. B. 278; *Jegon v. Vivian*, L. R., 6 Ch. 742, 760; *Phillips v. Homfray*, *Id.* 770. See also *A.-G. v. Tomline*, 5 Ch. D. 750; 15 Ch. D. 150, C. A. And where there is a *bonâ fide* disputed title, and no fraud, the jury should give only the fair value per acre, as if the defendant had bought the coal-field of the plaintiff. *Wood v. Morewood*, 3 Q. B. 440, n.; cited fully *post*, p. 980; *Hilton v. Woods*, L. R., 4 Eq. 432; *Livingstone v. Rawyards Coal Co.*, 5 Ap. Ca. 25, D. P. See further *Trotter v. Maclean*, 13 Ch. D. 574, and *McArthur v. Cornwell*, (1892) A. C. 75, J. C. Where the defendant has drawn coal from his own mine over the plaintiff's adjacent mine, the plaintiff is entitled to damages for way-leave. *Jegon v. Vivian & Phillips v. Homfray*, *supra*. So where the defendant has tipped spoil from his colliery on to the plaintiff's land, in estimating the damages, as to the value of the land so covered, the use to which it has been applied must be taken into account, as well as the diminution of the value of the rest of the plaintiff's land. *Whittham v. Westminster, &c. Coke Co.*, (1896) 2 Ch. 538.

The defendant may in mitigation of damages, show circumstances which he could not have pleaded in justification. See Rules, O. xxi., r. 4, *ante*, p. 310. *Secus*, as to matters which could have been so pleaded. *Simmons v. Norton*, 7 Bing. 640. A recovery against a co-trespasser not joined is not admissible in mitigation, but should be specially pleaded in bar. *Day v. Porter*, 2 M. & Rob. 151.

Damages must be assessed jointly against co-trespassers, *vide ante*, p. 922. An injunction will be granted to restrain the defendant from laying or keeping pipes on the plaintiff's land under the highway. *Goodson v. Richardson*, L. R., 9 Ch. 221. See also *Ramsden v. Manchester, &c. Ry. Co.*, 1 Ex. 723. Or from being on the highway for purposes other than its use as a highway. *Hickman v. Maisey*, *post*, p. 842. In such case instead of an injunction a declaration may be granted that the defendant was committing a trespass. *Harrison v. Rutland, &c.*, (1893) 1 Q. B. 142, C. A.; *Llandudno Urban Council v. Woods*, (1899) 2 Ch. 705. And where the plaintiff is not injured by the trespass an injunction may be refused. *S. C.* And so even where damages have been awarded. *Behrens v. Richards*, (1905) 2 Ch. 614.

Defence.

All matters relied on in justification must be pleaded specially, except where there is a statutory power to give them in evidence under the defence of "not guilty." *Vide infra*.

Where the trespass was an entry to make an unlawful distress, recovery by the plaintiff in an action of replevin, is no defence. *Gibbs v. Cruikshank*, L. R., 8 C. P. 454.

As to evidence in mitigation, see cases, *ante*, p. 939.

Not guilty by statute.] By various statutes particular persons were enabled to give special matter in evidence under the general issue. This defence is reserved by Rules, 1883, O. xix., r. 12, *ante*, p. 309. See further as to how this defence is to be pleaded, *ante*, p. 310, and *post*, p. 1142. By stat. 56 & 57 V. c. 61, s. 2 (c), however, the right so to plead has in many cases been abolished, *vide ante*, p. 923, and *post*, pp. 1131, 1132, and in such cases the defence must be pleaded specially. As to the defence in case of distress for rent in arrear, *vide ante*, p. 899.

Defence denying property or possession.] Under this defence the defendant might formerly have shown lawful title to possession in himself or in another under whom he claims. *Jones v. Chapman*, 2 Exch. 803, Ex. Ch.; and see *Burling v. Read*, 11 Q. B. 904. The defence put in issue mere *possession* where the defendant was a wrong-doer, and *title* where title was in dispute. It is, however, perhaps doubtful whether the defendant must not now plead specially title in himself, in order to raise that defence. *Vide infra*, and Bullen and Leake on Pleading, 6th ed. p. 936, n. (k).

Defence of title in the defendant, &c.] Where the defendant pleads title in himself or a third person by whose command he entered, on which issue is joined, the issue is upon him. *Pearson v. Coles*, 1 M. & Rob. 206. It puts the defendant on proof of his title, and denies the plaintiff's *right* of possession, but has been said to admit the *fact* of his possession, and to assert the defendant's *right* to the possession. 1 Wms. Saund. 300 a, (i); *Doe v. Wright*, 10 Ad. & E. 763; but see *Ewer v. Jones*, 9 Q. B. 625, Erle, J. The right of a landlord to re-enter and take possession of premises on the determination of a tenancy is not affected by a justice's warrant for delivery of possession having been obtained under 1 & 2 V. c. 74, and the 21 days thereby limited not having expired. *Jones v. Foley*, (1891) 1 Q. B. 730. The defendant pleaded title in A. and entry by his authority; held that, on proof that the defendant was receiver, and general agent of A., a minor in Chancery, the authority ought to be found. *Ewer v. Jones*, 9 Q. B. 623. Where the plaintiff and the person under whose authority the defendant justifies are tenants in common, the defendant is entitled to judgment. *Benington v. Benington*, Cro. Eliz. 157; *Jacobs v. Seward*, L. R., 4 C. P. 328; L. R., 5 H. L. 464. The declarations of the owner, after the trespass, are not evidence for the defendant of his authority. *Garr v. Fletcher*, 2 Stark. 71.

Co-tenancy with the plaintiff.] Co-tenancy with the plaintiff is no defence if the trespass by the co-tenant amount to an ouster. *Wilkinson v. Haygarth*, 12 Q. B. 837; *Murray v. Hall*, 7 C. B. 441; *Stedman v. Smith*, 8 E. & B. 1; 26 L. J., Q. B. 314. To remove the surface of the land or exclude him from the use of it, or to expel a person put in by the plaintiff, is such ouster. S. C. A tenant in common is not liable in an action of trespass or for conversion at the suit of his co-tenant, if he take away the whole produce of the land. *Jacobs v. Seward*, *supra*. In this case the court refused to

amend the frame of the action into one for an account under stat. 1 & 5 A. c. 3 (4 A. c. 16, Ruff.), s. 27, and on appeal, the refusal was held to be right. It is no defence, but only ground for reduction of damages, that there is a co-tenant with the plaintiff not joined. *Wilkinson v. Haygarth*, 12 Q. B. 837, 850.

Disclaimer and tender of amends.] The 21 J. 1, c. 16, s. 5, enacts, that, in all actions of trespass *qu. cl. fr.*, wherein the defendant shall disclaim in his plea to make any title or claim, to the land in which the trespass is, by the declaration, supposed to be done, and the trespass be by negligence or involuntary, the defendant shall be admitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass, before the action brought, whereupon or upon some of them the plaintiff shall be enforced to join issue; and if the said issue be found for the defendant, or the plaintiff shall be non-suited, the plaintiff shall be clearly barred from the said action, and all other suit concerning the same.

The trespass must be involuntary, it is not sufficient for it to have been committed by mistake, if it was voluntary. *Baseley v. Clarkson*, 3 Lev. 37. The statute does not extend to trespass *de bonis asportatis*; *Bailee v. Virash*, Stra. 549; and see 1 M. & Gr. 245, n.; nor to replevin. *Allen v. Bayley*, 2 Lutw. 1594.

Justification.] Where the plaintiff has joined issue on a defence of justification, the whole matter is put in issue, and must be proved so far as it is material to constitute a justification. *Phillips v. Howgate*, 5 B. & A. 220; *Atkinson v. Warne*, 1 C. M. & R. 827. See further *Action for assault*, *ante*, pp. 914 *et seq.* It is enough to prove a justification which covers the trespass, although it do not cover mere matter of aggravation. Thus, in an action for breaking, entering, and expelling, if the defendant justify only the breaking and entering, it is sufficient; for the breaking and entering are the gist of the action, and the expulsion is only matter of aggravation. *Taylor v. Cole*, 3 T. R. 292; 1 H. Bl. 555, Ex. Ch.; 1 Smith's L. C. 6th ed. This case was decided on demurrer to the plea, and has been cited to show that expulsion alone is not a trespass on the land, though it may make an entry a trespass *ab initio*. See *Cubitt v. Porter*, 8 B. & C. 257, 259. But, in *Meriton v. Coombes*, 9 C. B. 787; 19 L. J., C. P. 336, it was held that expelling from a house is an injury *in respect of the house*. As to when a sheriff can justify an entry under process, see *Seymayne's case*, 5 Rep. 91, and notes thereto in 1 Smith's L. C.; *Harvey v. Harvey*, 26 Ch. D. 641, and *Hodder v. Williams*, (1895) 2 Q. B. 663, C. A. As to justification of entry to abate nuisances see *Jones v. Williams*, 11 M. & W. 176, cited *ante*, p. 772.

Where a railway act authorizes the company to "enter upon, take and use" land under a highway for the purpose of making a tunnel therein, they cannot enter on the land without paying the owner of the soil (*vide ante*, pp. 932, 933) compensation therefor under the Lands Clauses Consolidation Act, 1845. *Ramsden v. Manchester, &c. Ry. Co.*, 1 Ex. 723; *Souch v. E. London Ry. Co.*, 22 W. R. 566; Bacon, V.-C., March 19, 1874, not following S. C., L. R., 16 Eq. 108. So where the company were authorized to "appropriate and use the sub-soil and undersurface" of land. *Farmer v. City & Waterloo Ry. Co.*, (1895) 1 Ch. 527.

Right of way.] The cases in which the grant of a way (*ante*, pp. 38 *et seq.*), and the dedication of a way to the public (*ante*, pp. 831 *et seq.*), will be presumed, have been already stated; and other cases applicable to this head will be found under the head *Action for disturbance of way*, *ante*,

pp. 825 *et seq.* The defendant cannot justify under a right of way, where the alleged trespass has been committed in assertion of a claim of property. *Cubitt v. Maxse*, L. R., 8 C. P. 707, *per* Cockburn, C.J., at N. P.

A defence of footway is supported by proof of carriage way; for the latter includes the former. *Per* Ld. Denman, C.J., *Davies v. Stephens*, 7 C. & P. 570. But a right to lead manure is not supported by proof of a footway and cattleway; for "leading" implies the use of a carriage. *Brunton v. Hall*, 1 Q. B. 792. The extent of the right is in all cases for the jury; proof of user for farming purposes is evidence of a right for *all* purposes. *Cowling v. Higginson*, 4 M. & W. 245; *Dare v. Heathcote*, 25 L. J., Ex. 245, cited *ante*, p. 830. As to how far the use of an easement granted, will be restricted to a reasonable use for the purpose of the land, in the condition in which it was when the grant was made, see cases cited *ante*, p. 836. The grant of a way may be explained by evidence of the state of the premises, at the time of the grant; but not by the acts or declarations of the parties before or after, unless there be a doubt which of two ways was intended. *Per* Parke, B., *Osborn v. Wise*, 7 C. & P. 761. Proof of a public way is not inconsistent with the fact that it is also a private way. *Brownlow v. Tomlinson*, 1 M. & Gr. 484. Where the defendant attempted to prove a public way over the plaintiff's close, by showing repairs done by the surveyor of the township, evidence was held admissible that they were done by agreement between the surveyor and plaintiff's steward, and were to be paid for by the steward; and the plaintiff needed not to show the steward's authority. *Ferrand v. Milligan*, 7 Q. B. 730.

The time of prescription with regard to rights of way is now altered by 2 & 3 W. 4, c. 71, the provisions of which have been already stated, *ante*, pp. 827 *et seq.*, where also some of the decided cases will be found. Sect. 5 relates more particularly to pleadings in actions of trespass. And see the cases cited *ante*, pp. 828 *et seq.*

Neither the grantor nor the grantee of a private way is, in the absence of express agreement, bound to repair the way granted; *ante*, p. 826; but if the way become foundrous, the grantee may not deviate *extra viam*. *Taylor v. Whitehead*, 2 Doug. 744; *Patterson v. Ritchie*, 1 M. & S. 393; 1 Wms. Saund. 322 c, (3). The right to deviate cannot be presumed to exist, as an incident to a limited dedication of a highway, as, where a path crosses a field and the landowner has reserved the right to plough up the path with the field; *Arnold v. Holbrook*, L. R., 8 Q. B. 96; the right to deviate may, however, be annexed by prescriptive enjoyment to a highway where the dedication is unlimited. *Id.*, pp. 98, 99; 2 Wms. Saund. 160 b, (12). If a private way have been obstructed by the grantor, A., the grantee may deviate over A.'s land. *Selby v. Nettlefold*, L. R., 9 Ch. 111. As to the effect of obstruction by a stranger, see *Dawes v. Hawkins*, 8 C. B., N. S. 848; 29 L. J., C. P. 343.

A person, H., is entitled to go on a highway only for the purpose of using it as such; if he use it for any other purpose he is liable in trespass to the owner of the soil, R. Thus, H. was so held liable, where he went on the highway for the sole purpose of disturbing R.'s right of sport, on R.'s adjoining lands, *Harrison v. Rutland*, *Dk. of*, (1893) 1 Q. B. 142, C. A.; or of watching trials of horses on those lands. *Hickman v. Maisey*, (1900) 1 Q. B. 752, C. A. In such cases it is material with what intention H. was using the highway. S. C.

[*Right of Common.*] On a right of common being set up the plaintiff may either deny the right stated, or he may traverse the measure of the common, viz., that the cattle were the defendant's own cattle, and that

they were levant and couchant (*vide ante*, p. 823) upon the premises, and commonable cattle. *Robinson v. Rayley*, 1 Burr. 316; B. N. P. 23. But, under the last reply the plaintiff would fail if it appear that *some* of the cattle were the defendant's commonable cattle levant and couchant; for the number is not material. 1 Wms. Saund. 346 *f*; (2); *Ellis v. Rowles*, Willes, 638. The plaintiff in such case should formerly have new assigned; and it will not be enough to deny that *all* the cattle were levant and couchant; for this amounts only to a denial that *any* were so. *Bowen v. Jenkin*, 6 Ad. & E. 911. Now the plaintiff's proper course is to amend his statement of claim, or reply specially, *vide ante*, p. 310.

The plaintiff may reply an approvement of the common, if it be common of pasture; *Glover v. Lane*, 3 T. R. 445; *Robinson v. Duleep Singh*, 11 Ch. D. 798, C. A.; 1 Wms. Saund. 363 *b*, (u), and *vide ante*, p. 825, and by custom there may be approvement in the case of common rights, other than the right of common of pasture. *Luscelles v. Ld. Onslow*, 2 Q. B. D. 433. See also *Arlett v. Ellis*, 7 B. & C. 346. So the plaintiff may reply that the common has been enclosed for upwards of 20 years; and if issue be taken on this reply, and it appear in evidence that *part* of the common has been inclosed for 20 years, and that the trespasses were in fact committed in that part, the plaintiff is entitled to recover for such trespasses, though the rest of the common is uninclosed. *Tapley v. Wainwright*, 5 B. & Ad. 395.

There are numerous reported cases, as to how much of a plea of right of common the defendant must have proved in order to succeed on the issue; the large powers of amendment now given to the courts will render those cases of little guide in future, and they are therefore not quoted in this edition.

The Prescription Act, 1832 (2 & 3 W. 1, c. 71), s. 1, relating to the acquisition of rights of common, &c., by long user, is cited fully *ante*, p. 823; and see sect. 5, as to pleading such rights, *ante*, p. 828. For the cases decided on sect. 1, see *ante*, pp. 823 *et seq.* Rights in gross are not within the act. *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 687; 34 L. J., C. P. 309. Therefore, a prescriptive right of common in gross in the defendant and his ancestors cannot be proved under that act, and is disproved by showing a grant 80 years ago to an ancestor. *Welcome v. Upton*, 5 M. & W. 398; *Davies v. Williams*, 16 Q. B. 546; 20 L. J., Q. B. 330. This would now be a case for amendment at the trial. But, an ancient grant, without date, is not necessarily at variance with prescription; for it may be anterior to legal memory, or only confirmatory; *Addington v. Clode*, 2 W. Bl. 989; and this is a question for the jury. S. C.

Where the plaintiff's house had been wrongfully erected on a common, the defendant, a commoner, cannot justify pulling down the house while the plaintiff's family are in it, without notice or a request to move; *Perry v. Fitzhove*, 8 Q. B. 757; *Jones v. Jones*, 1 H. & C. 1; 31 L. J., Ex. 506; but, if he pull it down after such notice and request, the defendant may justify under his right of common. *Davies v. Williams*, *supra*.

Licence.] The licence proved may be either an express one, or one implied from circumstances. The keeping open of a house, in which there is a public billiard-table, is a licence in fact to all persons to enter for the purpose of playing. *Ditcham v. Bond*, 3 Camp. 525. And, a defence of licence may be proved by showing an entry *against* the plaintiff's will under a provision in a lease that the defendant might enter for non-payment of rent, and plead leave and licence in bar of an action for such entry. *Kavanagh v. Gudge*, 7 M. & Gr. 316. A licence is in general

revocable, and if more than a licence is intended, and any interest in the land or permanent easement is meant to be passed, it must be by deed, or other proper conveyance; and a licence to enter on land as such, was not at law the less revocable because it was given for a valuable consideration. *Wood v. Leadbitter*, 13 M. & W. 838, overruling *Taylor v. Waters*, 7 Taunt. 374. But in the latter case an action will lie for breach of contract in revoking the licence; *Kerrison v. Smith*, (1897) 2 Q. B. 445; or to enforce the licence by specific performance or injunction, unless in either case the Stat. of Frauds, s. 4, *ante*, p. 312, were a bar to the action, by reason of the licence amounting to an interest in land. Even in such case, however, where there had been part performance, specific performance was sometimes decreed; *vide ante*, pp. 319 *et seq.*, and equitable rights are now enforced by all courts. J. Act, 1873, s. 24, *ante*, pp. 306 *et seq.* A licensee, under a revocable licence, is entitled to reasonable notice of revocation of the licence. *Mellor v. Watkins*, L. R., 9 Q. B. 400; *Aldin v. Latimer, & Co.*, (1894) 2 Ch. 437. As to what is in such case a reasonable notice, see *Wilson v. Tavenor*, (1901) 1 Ch. 578; *Lowe v. Adams*, (1901) 2 Ch. 598.

Although a mere licence is revocable, yet, that which is called a licence is often something more than a licence, it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it, so as to defeat his grant to which it was incident. Judgment in *Wood v. Leadbitter*, 13 M. & W. 844, 845. See *Liford's case*, 11 Rep. 46 b. So, a licence coupled with an interest is not revocable. Thus, where goods on the plaintiff's land were sold to the defendant upon conditions of sale, to which the plaintiff was a party, one of them being that the buyer should be allowed to enter and take the goods; it was held that this licence was irrevocable, and that although the plaintiff had, between the sale and entry, locked the gates and forbidden the defendant to enter, yet the defendant was justified in breaking down the gates and entering to take the goods. *Wood v. Munley*, 11 Ad. & E. 34. This case, although the decision in it appears to have been partly founded on the overruled case of *Taylor v. Waters*, *supra*, was recognized as good law in the judgment in *Wood v. Leadbitter*, *supra*; Alderson, B., there says, 13 M. & W. 853, "The case was analogous to that of a man taking my goods and putting them on his land, in which case I am justified in going on the land and removing them. Vin. Abr. Trespass, (11. a. 2), pl. 12, and *Patrick v. Colerick*, 3 M. & W. 483." See further on this point *Liggins v. Inge*, 7 Bing. 682, cited *ante*, p. 841, and *Gaussen v. Morton*, 10 B. & C. 731, in which last case it was held that an authority coupled with an interest was irrevocable. This is explained in *Smart v. Saunders*, 5 C. B. 895, 917. It has been held that there is no implied licence to enter a house and take goods sold by the plaintiff, the owner of the house, to the defendant, and left there by the plaintiff's consent. *Williams v. Morris*, 8 M. & W. 488. Nor, has an auctioneer who has been employed to sell goods on the premises of the proprietor such an interest in the goods as will make the licence to enter on the premises irrevocable. *Taplin v. Florence*, 10 C. B. 744; 20 L. J., C. P. 137. See also *Raffey v. Henderson*, 17 Q. B. 574; 21 L. J., Q. B. 49. A licence to enter premises and seize goods thereon cannot be assigned. *Ex pte. Rawlings*, 22 Q. B. D. 193, C. A.

An acquiescence by the plaintiff, in the trespass upon an erroneous representation (to which the defendant was a party) of the legal obligation of the plaintiff to submit to it, will not support a defence of licence. *Semb. Roper v. Harper*, 4 N. C. 20; *accord. Gregson v. Ruck*, 4 Q. B. 737. It is not sufficient to show a licence by a servant; *Holdingshaw v. Rag*, Cro. Eliz. 876; nor, by a wife; *Taylor v. Fisher*, *Id.* 246; nor, by a

daughter; *Cock v. Wortham*, 2 Selw. N. P., 2nd ed., 1085; unless the circumstances of the case show that the servant or wife or daughter respectively, was the agent of the party for granting such licence, so as to make it the licence of the master. A licence includes, as incident to it, a power to do everything without which the act licensed cannot be done. Thus, if A. license B. to enter his house to sell goods, B. may take necessary assistance for the purpose of selling the goods. *Dennett v. Grover*, Willes, 195. But, an authority from a tenant to his landlord, in the absence of the former, to let the premises, will not justify the landlord in entering the premises (the key being lost) through a window by means of a ladder in order to show the house. *Ancaster v. Milling*, 2 D. & Ry. 714.

If a man abuse an authority or licence which the law gives him, by which he becomes a trespasser *ab initio*, if the defendant plead such licence or authority, the plaintiff must reply the abuse specially. 1 Wms. Saund. 300, h, (q); 1 Smith's L. C., 6th ed., 126, 137, 138.

Statute of Limitation.] By the Limitation Act, 1623, 21 J. 1, c. 16, s. 3, an action of trespass must be brought within six years of the cause of action. Where, however, the cause of action has been fraudulently concealed, the statute runs from the discovery only. *Bulli Coal Mining Co. v. Osborue*, (1899) A. C. 351, J. C.; and even although the defendant took no active steps to prevent detection, where he intentionally abstracted the coal of a neighbouring mine. S. C. See further, *ante*, p. 681. Where minerals have been wrongfully, but inadvertently abstracted, the statute has been held to apply to such only as the defendant can prove to have been worked more than six years before action. *Trotter v. Maclean*, 13 Ch. D. 574.

ACTION FOR MESNE PROFITS.

In an action of trespass for mesne profits, the plaintiff may, by proper defences, be called upon to prove—1, his title; 2, his re-entry; 3, the defendant's liability by reason of possession; and 4, the amount of damages. *Pearse v. Coaker*, L. R., 4 Ex. 92.

Formerly this action could not, except in cases of landlord against tenant, be joined with an action of ejectment; this, however, is now altered by the Rules, 1883, O. xviii., rr. 1, 2, and it is now usual to add a claim for mesne profits, in an action brought for the recovery of possession of the land. The cases therefore in which the action for mesne profits is preceded by an action for the recovery of possession (hereinafter for brevity called an action of ejectment), are now infrequent.

Plaintiff's title.] Under a denial of title, the judgment in a prior action of ejectment is proof of title for the plaintiff, against all who are parties or privies to the judgment, and whether the judgment in ejectment be upon verdict or by default, but from the date of the writ only, as there is now no claim therein from an earlier date. See *Aslin v. Parkin*, 2 Burr. 665; *Doe v. Whitcomb*, 8 Bing. 46; *Wilkinson v. Kirby*, 15 C. B. 430; 23 L. J., C. P. 224; *Pearse v. Coaker*, *supra*. If the plaintiff seek to recover mesne profits anterior to the date in the writ in that action, it will be necessary for him to give further evidence of his title; B. N. P. 87; *Aslin v. Parkin*, 2 Burr. 668; *Barnett v. Guildford*, *El. of*, 11 Exch. 19; 24 L. J., Ex. 281; and the

judgment therein is in no case conclusive as evidence on an issue joined on the title to the close. To be conclusive it must be replied. *Doe v. Huddart*, 2 C. M. & R. 316; *Matthew v. Osborne*, 13 C. B. 919; 22 L. J., C. P. 241; see also *Vooght v. Winch*, 2 B. & A. 662. As to proof of the judgment, see *ante*, pp. 107 *et seq.* A county court order under 19 & 20 V. c. 108, ss. 50, 51, for giving up possession of premises, made against a person holding under the tenant, and complied with by him, was not conclusive evidence of title in a subsequent action against such person for mesne profits. *Campbell v. Loader*, 3 H. & C. 520; 34 L. J., Ex. 50. But it would be otherwise in an action of ejectment under 51 & 52 V. c. 43, s. 59, *vide ante*, p. 205.

Before the C. L. P. Act, 1852, it was held that a judgment in ejectment on the several demises of two or more persons was evidence of title for them in a joint action of trespass brought by them; for they may be tenants in common. *Chamier v. Clingo*, 5 M. & S. 64. The judgment will not be evidence against a stranger; and therefore a judgment in ejectment against a wife cannot be given in evidence against her husband. *Denn v. White*, 7 T. R. 112. But, it is evidence against a person who comes into possession, after the judgment, under the defendant in ejectment; *Doe v. Whitcomb*, 8 Bing. 46; though not against a person merely shown to be in possession without further proof of privity to the judgment; *Doe v. Harvey*, 8 Bing. 239; and, it cannot be shown by oral evidence that the defendant came in under the defendant in the former action, where it appears he came in under a written agreement. S. C. In a case before the C. L. P. Act, 1852, where, after judgment by default against the casual ejector, an action for the mesne profits was brought against the landlord, who had been in the receipt of the rents and profits from the day of the demise, Ld. Ellenborough ruled that the judgment was not evidence against him, without notice of the ejectment; but, that a subsequent promise by him to pay the rent and costs amounted to an admission that he was a trespasser, and that the plaintiff was entitled to the possession. *Hunter v. Britts*, 3 Camp. 455. By the C. L. P. Act, 1852, s. 209, every tenant to whom a writ for the recovery of possession of land is delivered, or to whose knowledge it comes, is bound to give notice thereof to the landlord of the land.

Plaintiff's re-entry.] The plaintiff should be prepared to show entry into the premises before bringing the action, and this may be proved by showing an actual entry, or by producing an examined (or office, *vide ante*, p. 97), copy of the writ of possession and of the sheriff's return. It is, however, very questionable whether the judgment in ejectment is not, *per se*, sufficient proof of such possession, as to maintain this action as from the date of recovery, or of the writ, without further proof of entry. See *Wilkinson v. Kirby*, 15 C. B. 430; 23 L. J., C. P. 224. The entry has relation to the first accruer of the title, so as to entitle the plaintiff to mesne profits from that time. *Barnett v. Guildford, El. of*, 11 Exch. 19; 24 L. J., Ex. 281; *Litchfield v. Ready*, 5 Exch. 939; B. N. P. 87, 88.

Defendant's possession.] The duration of possession must, it seems, be proved, where the defendant lets judgment go by default. *Jee v. Scott*, 9 Dowl. 193; see *Pearse v. Coaker*, L. R., 4 Ex. 92, 98, *per Kelly*, C.B. The action has been said to lie only against the person who is actually in possession and trespassing, and therefore do not lie against a lessee, whose under-tenant holds over, after the expiration of the lessee's interest. *Burne v. Richardson*, 4 Taunt. 720. But this doctrine must be qualified: for, where defendant in ejectment, K., had previously demised to A., who underlet to B., and B. wrongfully held over, paying rent to A., who accepted it under his title from K., it was held that all three might be joined in trespass for the

mesne profits, and that the record in the ejectment against K. was evidence against A. and B. *Doe v. Harlow*, 12 Ad. & E. 40. And, it makes no difference that the under-tenant held over against the will of his lessor; *Henderson v. Squire*, L. R., 4 Q. B. 170: though in *Doe v. Harlow*, *supra*, Ld. Denman, C.J., intimated a different opinion. The defendant cannot defeat the action by showing that he entered only as agent for, and under the licence of, the defendant in ejectment. *Girdlestone v. Porter*, Woodf. Land. & Ten. 7th ed. 653, (y). Where the defendant was shown to have a lease of the premises, which was not produced, and to have paid a yearly rent under that lease, this was held by Kelly, C.B., to be evidence of possession. *Pearse v. Coaker*, L. R., 4 Ex. 92, 99.

The effect of the judgment in ejectment as evidence of the defendant's possession seems to be hardly settled. In *Pearse v. Coaker*, *supra*, there was some evidence, *abundant*, of the defendant's possession; but Channell and Cleasby, BB., held that a judgment by default in ejectment was evidence that the defendant named in the judgment which embodied the writ, was *at the date of that writ* tenant in actual possession, although the defendant was not thereby estopped from showing that he never was in possession; Kelly, C.B., however, relying on *Ive v. Scott*, *ante*, p. 946, held that the judgment was no evidence of the defendant's possession at all. Before the C. L. P. Act, 1852, the consent rule admitted possession by the defendant at the time of the service of the declaration; but, if the plaintiff sought damages for an earlier period, he must have given further evidence of the possession. *Dodwell v. Gibbs*, 2 C. & P. 615; *Aslin v. Parkin*, 2 Burr. 668; *Doe d. Evers v. Challis*, 17 Q. B. 166.

Damages.] The plaintiff must be prepared to prove the value of the mesne profits. In *Pearse v. Coaker*, *supra*, the yearly rent paid was allowed to be used to measure the value. The jury are not, however, in estimating the damages, confined to give the mere rent, or annual value of the premises, but may give such extra damages as they may think fit, as a compensation for plaintiff's trouble, &c. *Goodtitle v. Toombs*, 3 Wils. 121; *Doe d. Levi v. Roe*, 6 C. B. 275, *per* Cresswell, J. The plaintiff may also recover, as damages, the costs of the action of ejectment; but, if that action were defended and the costs taxed, he cannot recover more than such taxed costs. *Doe v. Filliter*, 13 M. & W. 47. The costs must be laid as special damage, and proved on the trial. Where the damage laid, was that the plaintiff "incurred great expense in recovering possession of the said land and messuage," it was held that this was sufficient to include the costs of the ejectment. *Pearse v. Coaker*, *supra*. The plaintiff was also entitled to recover, by way of damages, the costs incurred by him in a court of error, in reversing the judgment in ejectment erroneously obtained by the defendant. *Nowell v. Roake*, 7 B. & C. 404. And, the plaintiff is not restricted to the date of the writ, as the time from whence he was entitled in possession, but may also recover the profits which accrued previously, if he had title to the premises at the time, and the defendant was in possession. See B. N. P. 87. The jury, however, are to give damages only for the time the defendant is proved to have been in possession, and since the plaintiff's title accrued. *Stany-nought v. Cosins*, Barnes, 456. Ground-rent and other outgoings, which plaintiff himself must have paid if in possession, should be deducted by the jury from the damages. *Doe v. Hare*, 2 Cr. & M. 145; see also *McArthur v. Cornwell*, (1892) A. C. 75, J. C.

Other special damage may be recovered if laid in the statement; as, deterioration of the premises by waste or mismanagement of the defendant, &c. See Cole on Ejectment, p. 830, Form No. 391: *Dunn v. Large*, 3 Doug. 335.

Statute of Limitation.] *Vide ante*, p. 945. Unless the statute is pleaded, profits for a longer period than six years may be recovered. B. N. P. 88.

ACTION FOR CONVERSION OF GOODS.

The action for converting the plaintiff's goods to the defendant's use, or wrongfully depriving him of the use and possession of them, is equivalent to the old action of *trover*, by which name it is still commonly called.

To maintain the action there must be an act of conversion, such as must amount to a deprivation of the possession, to such an extent as to be inconsistent with the right of the owner, and evidence an intention to deprive him of that right. *Fouldes v. Willoughby*, 8 M. & W. 540; *Burroughes v. Bayne*, 5 H. & N. 296; 29 L. J., Ex. 185. "And any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion." *Per* Ld. Chelmsford, *Fowler v. Hollins*, L. R. 7 H. L. 757, 795, *vide* S. C., cited *post*, p. 978. In these cases the defendant was in possession of the goods; but, where the plaintiff is left in possession of the goods, he must prove that his dominion over them has been interfered with, not in some particular way, but altogether; that he has been entirely deprived of the use of them. *England v. Cowley*, L. R., 8 Ex. 126, 130.

The evidence in an action for conversion will depend upon the issue joined. The facts which constitute a complete title for the plaintiff in this action, and which must be proved if denied by the pleadings, are—1, a general or special property in the goods; or, as against a wrong-doer, a mere possession of them; 2, an actual or constructive possession or right of possession; and, 3, a wrongful conversion by the defendant. In addition to this, the plaintiff must prove, 4, the value or damages.

Evidence of general property.] The defence of no property in the plaintiff, means no property as against the defendant. *Nicolls v. Bastard*, 2 C. M. & R. 659. When the property in the goods is put in issue, the evidence for the plaintiff will depend upon the nature of his particular title. Where there is both a general and a special owner, but the general owner has not transferred his right to the possession, he may still maintain this action; thus, where he has delivered the goods to a carrier or other bailee, and so parted with the actual possession, he may still maintain trover for a conversion by a stranger; for the owner retains the possession in law, as against a wrong-doer, and the carrier or other bailee is only his servant. *Gordon v. Harper*, 7 T. R. 42; 2 Wms. Saund. 47, b, c (1); *Nicolls v. Bastard*, *supra*. Plaintiff sold porter in casks to A., and the casks, when empty, were to be returned or kept at invoice price, at the plaintiff's option: it was held, that, when empty, the plaintiffs had such a property and right of possession as to support trover against the sheriff who seized and sold under a *fi. fa.* against A. *Manders v. Williams*, 4 Exch. 339; *acc. Jelks v. Hayward*, (1905) 2 K. B. 460. And, if the bailee of goods for a special purpose transfer them to another in contravention of that purpose, the general owner may maintain trover against the transferee, though he be a *bonâ fide* vendee, unless the goods have been sold in market overt. *Wilkinson v. King*, 2 Camp. 335; *Loeschman v. Machin*, 2 Stark. 311; but see 2 Wms. Saund. 47 d (f). Where railway

waggons have been hired from the plaintiffs for a certain time, it was held that the sheriff was not liable to an action for merely selling them under a *fi. fa.*, but that he became liable, when it appeared that these waggons had been used by the persons who bought them, and worn by such user. *Lancashire Waggon Co. v. Fitzhugh*, 6 H. & N. 502; 30 L. J., Ex. 231. The defendant may be liable for a conversion committed by him before the plaintiff's property accrued. See *Bristol, &c. Bank v. Midland Ry. Co.*, *post*, p. 981.

It is laid down in the old authorities that trover lies for money, the property in which is in the plaintiff, and to the possession of which he is entitled *in specie*, though the money be not in a bag. The difficulty therein suggested of recovering the specific coins by an action of detinue (*vide post*, p. 995), does not arise in trover, which is an action to recover damages for the conversion merely. *Kinaston v. Moor*, Cro. Car. 89; *Davis v. Dagos*, Aleyn, 91; *Jenkins Cent.* 207; 3 Salk. 365; *Orton v. Butler*, 5 B. & A. 652. In *Hall v. Wood*, Dyer, 22, in marg.; S. C., Cro. Eliz. 841, trover was held maintainable for money given by the plaintiff to the defendant to keep, though not in bags. See also *Harris' case*, Noy, 128, and *Hanberries' case*, cited in *Holliday v. Hicks*, Cro. Eliz. 661; *post*, p. 962. In S. C., in error, *Id.* 746, it was held that the action did not lie by a master against his servant, for money received by the servant, for corn sold by him for his master, for the property in the money was in the servant.

Trover lies for a lost bank-note which the defendant has converted, though part of the proceeds have been paid by him to the plaintiff; nor does the acceptance of such part waive the tort. *Burn v. Morris*, 2 Cr. & M. 579.

This action does not lie for anything savouring of the realty, as for fixtures attached to the freehold. *Minshall v. Lloyd*, 2 M. & W. 450; see also cases cited *post*, pp. 968 *et seq.* But, an action will lie for wrongfully depriving the plaintiff of his right to remove fixtures. *London & Westminster Loan Co. v. Drake*, 6 C. B., N. S. 798; 28 L. J., C. P. 297. Where two persons are apparently in possession of goods, the legal possession follows the title. *Ramsay v. Margrett*, (1894) 2 Q. B., 18 C. A.

Vesting of the property—Sale of goods.] The transfer of property in goods on a sale thereof is now governed by the Sale of Goods Act, 1893, which provides as follows:—

Sect. 16.—“Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.”

Sect. 17.—(1.) “Where there is a contract for the sale of specific,” see sect. 62 (1), *ante*, p. 521, “or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2.) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.” See *Varley v. Whipp*, (1900) 1 Q. B. 513.

Sect. 18.—“Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

“Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state,” *vide* sect. 62 (4), *ante*, p. 522, “the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

“Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting

them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

"Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

"Rule 4.—When goods are delivered to the buyer on approval or 'on sale or return' or other similar terms the property therein passes to the buyer:—

"(a.) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction:

"(b.) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

"Rule 5.—(1.) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made:

"(2.) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

Sect. 19.—(1.) "Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled."

If the contract of sale be within the S. of G. Act, 1893, s. 4, and there be no note or memorandum, acceptance, or earnest, the contract cannot be enforced, but it seems that it is not thereby avoided, and that the property passes. *Taylor v. Gt. E. Ry. Co.*, (1901) 1 K. B. 774. See as to when the statute is satisfied, *ante*, pp. 527 *et seq.* In the case of the sale of unascertained or "future" (see sect. 5 (1), *ante*, p. 522) goods, where an appropriation has been made by one party, in pursuance of an authority to make the election conferred by agreement, then by rule 5 (1), *supra*, the property passes. Thus, where the plaintiff agreed to purchase 100 quarters of barley from K., part of a larger quantity which he saw and approved, and of which he took away a sample; it was also agreed that the plaintiff should send his sacks to K., who was to fill them with the barley, and take them to the railway for conveyance to the plaintiff; the plaintiff sent 200 sacks, and K. filled 155 of them; it was held that as soon as each sack was filled with barley, the property in the barley in the sacks vested in the plaintiff. *Aldridge v. Johnson*, 7 E. & B. 885, 900; 26 L. J., Q. B. 296. So, where plaintiff contracted in writing with a farmer for the purchase of the whole of his next crop of oil of peppermint, after the oil was made it was bottled and

weighed by the farmer in bottles supplied by the plaintiff, who had also made advances to the farmer on account, it was held that trover lay by the plaintiff against a subsequent vendee of the oil, to whom the farmer had improperly sold it. *Langton v. Higgins*, 4 H. & N. 402; 28 L. J., Ex. 252. So, where the charterers of a ship contract for the supply of a cargo of wheat for it, at 4s. 7d. f. o. b., the property passes as delivery is made on board. *Colonial Insur. Co. of New Zealand v. Adelaide Marine Insur. Co.*, 12 Ap. Ca. 128, J. C. But, where the charterers sell a cargo which is to be loaded on board a ship for a sum "per cwt. c. & f.," no property passes until the cargo is complete; the part shipped remains the property of the seller. *Anderson v. Morice*, 1 Ap. Ca. 713, D. P. The assent of the buyer to the appropriation of particular goods may be given by an agent, such as a wharlinger or warehouseman, and may be either expressed or implied. *Campbell v. Mersey Docks and Harbour Board*, 14 C. B., N. S. 412, *per* Willes, J.

Under sect. 18, rule 4 (a), *ante*, p. 950, where W. received goods from K. "on sale or return" and pledged them with A., W. thereby did an act adopting the transaction, and the property passed to A. *Kirkham v. Attenborough*, (1897) 1 Q. B. 201, C. A. It is otherwise, however, where the goods are delivered "On approbation. On sale for cash only or return. Goods had on approbation or on sale or return remain the property of K. until such goods are settled for or charged." *Weiner v. Gill*, (1905) 2 K. B. 172; (1906) 2 K. B. 574, C. A.

By sect. 21 (1). "Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell. (2.) Provided also that nothing in this act shall affect—(a.) The provisions of the Factor's Acts," *vide post*, pp. 957 *et seq.*, "or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof; (b.) The validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction." Where F., the owner of goods, has given C. a limited power of selling them, and C. sells them fraudulently to K., an innocent buyer, F. is not by his conduct precluded from denying C.'s authority to sell, unless he held out C. as his agent to sell the goods to K. *Farquharson v. King*, (1902) A. C. 325. See *Weiner v. Gill*, *supra*.

Where a seller has recognized the right of his buyer to dispose of goods remaining in the actual possession of the seller, he cannot defeat the right of a person claiming under the buyer, on the ground that no property passed to the latter, by reason of the want of a specific appropriation of the goods. *Woodley v. Coventry*, 2 H. & C. 164; 32 L. J., Ex. 185; *accord. Knights v. Wiffen*, L. R., 5 Q. B. 660; see also *Henderson v. Williams*, (1895) 1 Q. B. 521, C. A. But an undertaking by seller, A., to deliver to B.'s order, a specific quantity of unascertained goods, does not prevent A. from setting up his lien for unpaid purchase-money against B.'s buyer. *Farmeloe v. Bain*, 1 C. P. D. 445.

The property in goods passes on a sale by auction, though they are not paid for; *Scott v. England*, 2 D. & L. 520; *Sweeting v. Turner*, L. R., 7 Q. B. 310. A quantity of iron was to be delivered under a contract that certain bills outstanding against the seller should be taken out of circulation: a part of the iron had been delivered, but no bills had been taken out of circulation, and the seller brought trover for the part delivered: held that, it being only a conditional delivery, and the condition being broken, the action might be maintained; and *per* Bayley, J., "if a tradesman sold goods to be

paid for on delivery, and his servant, by mistake, delivers them without receiving the money, he may, after demand and refusal to deliver or pay, bring trover for his goods against the purchaser." *Bishop v. Shillito*, 2 B. & A. 329, n.; *Brandt v. Bowlby*, 2 B. & Ad. 932; see *Bateman v. Green*, 1 R., 2 C. L. 166, Q. B. But, there may be a contract for the sale of goods whereby the property in them passes at once, subject to a right in the seller to retain possession of them until a bill is paid. *Ex pte. Middleton*, 3 D. J. & S. 201; 33 L. J., Bky. 36. In such case, however, the buyer cannot maintain trover against a third person who converts the goods, for the buyer is not entitled to the present possession of them. *Lord v. Price*, 1 R., 9 Ex. 54. The property which passes by the sale may be divested by rescinding the contract. Thus, where A. sold goods to B., and afterwards and before the delivery to B., C. became possessed of the goods, and, on being informed of the circumstances, declared that he would not deliver them to any person whatever, it was held that A., having repaid B., might maintain trover against C.; the contract between A. & B. being rescinded, and B. being remitted to his former position. *Pattison v. Robinson*, 5 M. & S. 105. Where A. is indebted to C., and B. to A., and it is agreed between them that B. shall deliver goods to C. in satisfaction of A.'s debt, and B. converts them to his own use, C. may maintain trover for the goods, though he never had possession; for by the agreement the right is in him. B. N. P. 35. As to the effect on a ready money sale of goods, of the dishonour, after the delivery of the goods, of a cheque taken for their price, see *Loughnan v. Barry*, 1 R., 6 C. L. 457.

As to the vesting of property under bills of lading, see *Action on contract of affreightment, ante*, pp. 459 *et seq.*

If general, where goods are ordered to be made, so long as the order is not executed, but only in course of execution, no property passes to the person for whom they are to be made. *Mucklow v. Mangles*, 1 Taunt. 318; see *Bellamy v. Davey*, (1891) 3 Ch. 540. In order to pass the property there must in such cases be a completion and an acceptance, or at least an approval, by the buyer. *Atkinson v. Bell*, 8 B. & C. 277, 282, 283, cited *ante*, p. 585. See also *Girardot v. Fitzpatrick*, *ante*, p. 543. In some cases, however, the property passes before the order is executed. Thus, it has been held that where A. agreed to build a ship for B., and it was part of the terms of the contract, that given portions of the price should be paid according to the progress of the work, the court considered that the payment of these instalments appropriated specifically to B. the very ship in progress, and vested in him a property in that ship. It was, however, part of the facts in this case that A. by assenting to the registration of the ship as B.'s property, appropriated the ship to B., though not complete. *Woods v. Russell*, 5 B. & A. 942. A shipbuilder contracted with P. to build him a ship for a certain sum, to be paid by instalments as the work proceeded; the first instalment when the vessel was rammed, the second when she was timbered, &c. An agent for P. was to superintend the building. The vessel was built under such superintendence, all the materials being approved by the agent before they were used. The builder became bankrupt before the ship was completed; afterwards his assignees completed the ship. All the instalments were paid or tendered. In an action of trover by P. against the assignee for the ship, the court held, that, on the first instalment being paid, the property in the portion then finished became, by virtue of the contract, vested in P., subject to the right of the builder to retain such portion for the purpose of completing the work, and earning the rest of the price, and that each material subsequently added became, as it was added, the property of P. as the general owner. The judgment of the court was given with much doubt, and the approval of P.'s agent during the building was regarded as an acceptance of the ship in each

stage of the work. *Clarke v. Spence*, 4 Ad. & E. 448. So, where the ship-builder gives the plaintiff a bill of sale of the ship, while incomplete, as a security for advances made from time to time, it was held that the property in the ship vests during the progress. *Read v. Fairbanks*, 13 C. B. 692; 22 L. J., C. P. 206. In the above case the bill of sale was relied upon as evidence of the intention of both parties; and, generally, it appears that these decisions as to ship-building are not exceptions to the rule of law, but depend on the intention of the parties as shown by the contract, and their acts done under it. See also *Laidler v. Burlinson*, 2 M. & W. 602; *Goss v. Quinton*, 3 M. & Gr. 825; *Wilkins v. Bromhead*, 6 M. & Gr. 963; *Wood v. Bell*, 6 E. & B. 355, Ex. Ch.; 25 L. J., Q. B. 321; *Seath v. Moore*, 11 Ap. Ca. 350, D. P.; *Anglo-Egyptian Navigation Co. v. Rennie*, L. R., 10 C. P. 271; and *Id.* 571 in Ex. Ch., where no judgment was given. The property in a ship passes, as between the vendor, his trustee in bankruptcy, and the vendee, by a bill of sale, although the transfer be not registered as required by the Merchant Shipping Act, 1894. See *Stapleton v. Hayman*, 2 H. & C. 918; 33 L. J., Ex. 170. See also as to such unregistered bills of sale, *Union Bank of London v. Lenanton*, 3 C. P. D. 243, C. A.

As to vesting of property where goods are bought on the "hire system," see *Ex pte. Crawcour*, 9 Ch. D. 419, C. A., and other cases cited *post*, pp. 1199, 1200.

Where the buyer selected timber from felled trees, and marked the parts purchased, which the seller was to cut and deliver, and the seller became bankrupt before the cutting, it was held that the whole passed to his assignees. *Acruman v. Morrice*, 8 C. B. 449; *Baker v. Gray*, 17 C. B. 462; 25 L. J., C. P. 161. See *Cooper v. Bill*, 3 H. & C. 722; 34 L. J., Ex. 161.

Whenever there is a delivery of property, on a contract for an equivalent in money, or some other valuable commodity, not for the return of the identical subject-matter in its original or an altered form, this is a transfer of property for value, a sale and not a bailment. *S. Australian Insur. Co. v. Randell*, L. R., 3 P. C. 101, 108.

Gift and grant.] By a gift of goods the property does not pass, unless the gift be by deed or instrument [*semb.*, under seal, 2 Wms. Saund. 47 c, (d), or testamentary, 25 Q. B. D. 61], of gift, or be executed by an actual delivery of the thing given to the donee; *Irons v. Smallpiece*, 2 B. & A. 551; *Cochrane v. Moore*, 25 Q. B. D. 57, C. A.; see *Douglas v. Douglas*, 22 L. T. 127, E. T. 1869, Ex. But an antecedent delivery of the thing *alio intuitu* to the donee is sufficient; see *Cain v. Moore*, (1896) 2 Q. B. 283. And manual delivery seems not to be always necessary, as where P.'s furniture, being in K.'s house, P. went to the house, and in a room where some of it was, gave, *per verba de presenti*, all the furniture to his daughter, K.'s wife, and then left; this was held to amount to a sufficient change of possession from K. to his wife, consequent on the gift to effectuate it. *Kilpin v. Rapley*, (1892) 1 Q. B. 582. And it has been said that if A. in London give J. S. his goods at York, and another take them away before J. S. obtains actual possession, J. S. may maintain trover or trespass for them. Br. Abr. Trespass, 303; *Hudson v. Hudson*, Latch. 214; 2 Wms. Saund. 47 b, (1), (d). If A. in his lifetime give to B. a security (as a policy of insurance or a railway debenture) for B.'s use and benefit, and B. takes possession of it, A.'s executors cannot sue for recovery of the deed; for the property in the paper passed, though such a gift was ineffectual at law for transferring any legal interest in the security as such. *Rummens v. Hure*, 1 Ex. D. 169, C. A., following *Barton v. Gainer*, 3 H. & N. 387; 27 L. J., Ex. 390; where the form of action was detainue. The same delivery is required for a gift as to make a good *donatio mortis causa*; *Irons v. Smallpiece*, *ante*, p. 953; as to what amounts to such delivery, actual or constructive, see further 1 Wms. Exors.,

10th ed. pp. 593 *et seq.* A grant of goods to A. passes the property at once without any act of assent by B., even although the deed creates an onerous trust. *Siggers v. Evans*, 5 E. & B. 367; 24 L. J., Q. B. 305. See also other cases cited *ante*, p. 726, and *L. & County Banking Co. v. L. & River Plate Bank*, *ante*, p. 660. But A. may make refusal *in pais*, and by that the property in A. will be divested. *Butler and Baker's case*, 3 Rep. 26 *b*; *Standing v. Bowring*, 31 Ch. D. 282, C. A. The same principles apply where the grantee is shown to have declined to accept the goods except as a loan; this negatives the evidence of gift. See *Hill v. Wilson*, L. R., 8 Ch. 888, 896. A conveyance of goods to the "C. I. & A. Co.," under which style the defendants carried on their business as money lenders, was held to pass the property in the goods to them. *Maugham v. Sharpe*, 17 C. B., N. S. 443; 34 L. J., C. P. 19; *accord. Simmons v. Woodward*, (1892) A. C. 100, D. P. The mortgagee of goods is the absolute owner at law; *Maugham v. Sharpe*, *supra*. And so also where the mortgage is to be absolute only on conditions, *e.g.*, those in the Bills of Sale Act, 1882, s. 7, and sched., and these have been fulfilled. *Johnson v. Diprose*, (1893) 1 Q. B. 512, C. A. A tender of principal, interest, and costs after the date for payment does not divest the mortgagee's property in the goods; the mortgagor's only remedy is an action for redemption, and, on taking the account, damages to the goods caused by the mortgagee's negligence are recoverable. S. C. A mortgage of goods can be made without deed. *Reeves v. Capper*, 5 N. C. 136; *Flory v. Denny*, 7 Exch. 581; 21 L. J., Ex. 223. In the case of a contract of a pledge the delivery of the goods need not be contemporaneous with the advance of the money; it is sufficient if they are subsequently delivered under the contract. *Hilton v. Tucker*, 39 Ch. D. 669. A gift made by an infant, by delivery, is good. *Taylor v. Johnson*, 19 Ch. D. 603. A lunatic, as found by inquisition, cannot while it remains in force, even during a lucid interval, make a valid deed disposing of his property. *In re Walker*, (1905) 1 Ch. 160, C. A., following *Beverley's Case*, 4 Rep. 123 *b*. The donor of a voluntary gift, obtained by an innocent misrepresentation of fact by the donee, may recover it on discovery of the mistake. *In re Glubb*, (1900) 1 Ch. 354.

A grant of goods not in existence, or not belonging to the grantor at the time of executing the deed of grant, was void at law, until the grantor ratified the grant, by some act done by him, with that view, after he had acquired the property therein. *Lunn v. Thornton*, 1 C. B. 379. In equity, however, a contract which engaged to transfer to a purchaser or mortgagee, property of which the vendor or mortgagor was not possessed at the time, transferred the beneficial interest, immediately on the property being acquired by him; *Holroyd v. Marshall*, 10 H. L. C. 191; 33 L. J., Ch. 193; and this right is now, under the J. Act, 1873, s. 24, *ante*, pp. 306, 307, enforced in all courts. Thus, a grant of the stock-in-trade; *Lazarus v. Andrade*, 5 C. P. D. 318; or, of growing crops; *Clements v. Matthews*, 11 Q. B. D. 808, C. A., "then on, or thereafter to be on the premises, A." will pass the property in the stock, or crops when there. See also *Official Receiver v. Tailby*, 13 Ap. Ca. 523, D. P.; *In re Turcan*, 40 Ch. D. 5, C. A. But the contract must itself purport to convey the interest in the property, for a mere licence to seize will confer no interest before seizure. *Reeve v. Whitmore*, and *Martin v. Id.*, 4 D. J. & S. 1; 33 L. J., Ch. 63. In such case the property passes on seizure; *Hope v. Hayley*, 5 E. & B. 830; 25 L. J., Q. B. 155; *Carr v. Allatt*, 27 L. J., Ex. 385; and is not then subject to the execution of the judgment creditor of the assignor. *Chidell v. Galsworthy*, 6 C. B., N. S. 471. But where the licence to seize after-acquired property is given to secure a debt, the licensee cannot seize goods acquired subsequently to the grantor's bankruptcy; *Thompson v. Cohen*, L. R., 7 Q. B. 527; even although the licence is coupled with an assignment; *Cole v. Kernot*, *Id.* 534, n.; *Coltjer v. Isaacs*, 19 Ch. D.

342, C. A. A licence to enter and seize goods is not assignable. *Ex pte. Rawlings*, 22 Q. B. D. 193, C. A. The grant to B. of property, not then in the possession of the grantor A., confers on B. an equitable title only, which may be defeated by a legal title being acquired by C. without notice of B.'s equitable title, and before the latter had become a legal one. Thus if C. by pledge, *Joseph v. Lyons*, 15 Q. B. D. 280, C. A.; or bill of sale for valuable consideration, *Hollis v. Robinson*, *Id.* 288, C. A., acquire such legal interest from A. without notice of B.'s title, C. acquires a good title. Where a builder, A., agrees with B. to build on B.'s land, and that all building materials brought by A. on the land shall become the property of B., the legal property in them vests in B., when they are brought there. *Reeves v. Barlow*, 12 Q. B. D. 436, C. A.; *Hart v. Porthgrain Harbour Co.*, (1903) 1 Ch. 690. Where a bill of sale is given of the furniture in a house, and some of those articles are afterwards exchanged for others with the consent of the grantee, the property in the latter goods passes to the grantee. *Cooper v. Tatham*, 15 L. T. 218, Blackburn, J. A mortgage of a ship passes to the mortgagee under the word "ship" articles then on board necessary to the navigation of the ship, or the accomplishment of the objects of the voyage, and also articles brought on board in substitution for them after the mortgage. *Coltman v. Chamberlain*, 25 Q. B. D. 328. Where the grantor A., is allowed by the grantee B., to have the apparent ownership and possession of goods, which are employed in B.'s business, and comprised in the bill of sale, and A. sells them in the course of his business to C., who has no notice of B.'s title; C. acquires a good title; *National Mercantile Bank v. Hampson*, 5 Q. B. D. 177; *Walker v. Clay*, 49 L. J., C. P. D. 561; but it is otherwise where A. sells the goods to C. fraudulently, and not in the ordinary course of his business, although C. had no notice of the fraud. *Taylor v. McKeand*, 5 C. P. D. 358. See also *Ex pte. Allard*, 16 Ch. D. 505, C. A. Where a bill of sale of goods is given as security for a debt payable by instalments, the grantee may seize the whole of the goods on default of payment of one instalment. *Ex pte. Wolfe*, (1894) 1 Q. B. 605. See as to notice before seizure, *Toms v. Wilson*, 4 B. & S. 442, 445; 32 L. J., Q. B. 33, 382; *Brightly v. Norton*, *Id.* 38; *Belding v. Read*, 3 H. & C. 955; 34 L. J., Ex. 212; and cases cited *post*, p. 968.

By the Bills of Sale Act, 1878 (41 & 42 V. c. 31), s. 10, the priority of two or more bills of sale, which comprise the same chattels, is, as regards such chattels, in the order of the date of the registration of the bills of sale. Want of attestation by a solicitor, as required by that section, does not affect the bill of sale as between grantor and grantee. *Davis v. Goodman*, 5 C. P. D. 128, C. A. But now by the Amendment Act, 1882 (45 & 46 V. c. 43), a bill of sale given as security for the payment of money is void, unless attested by some witness, not a party, and registered, sects. 8, 10; and in the form given in the Schedule, sect. 9; so, if given for any sum less than 30*l.*, sect. 12. See further as to the provisions of these acts, and the construction thereof, *post*, pp. 1191 *et seq.*

Possession obtained by fraud.] By a fraudulent or illegal sale, or transfer of goods, no property passes. *Wilkinson v. King*, 2 Camp. 335. So, a sale of live pheasants passed no property while the 58 G. 3, c. 75, prohibiting the sale, was in force. *Helps v. Glenister*, 8 B. & C. 553. So, where a person obtains goods under colour of a purchase upon false pretences, or with the preconceived fraudulent intention of not paying for them, the seller may avoid the contract. *Noble v. Adams*, 7 Taunt. 59; *Bristol, Ld. v. Wilsmore*, 1 B. & C. 514; *Irring v. Motly*, 7 Bing. 543; *Loud v. Green*, 15 M. & W. 216; *Dixon v. Hewetson*, 16 L. T. 295, Willes, J. But when a buyer obtains possession of a chattel, with the intention by the seller to transfer both the property and possession, although the buyer has committed a false

and fraudulent misrepresentation, in order to effect the contract or obtain the possession, the property vests in the buyer, until the seller has done some act to disaffirm the transaction. *Kingsford v. Merry*, 11 Exch. 577, 579; 25 L. J., Ex. 166, 168 (as to which case *vide infra*); *The Marie Joseph*, L. R., 1 P. C. 219, 229. And by the Sale of Goods Act, 1893, s. 23: "When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title." This follows the rule laid down in *Kingsford v. Merry*, *supra*; *Higgons v. Burton*, 26 L. J., Ex. 342; *Attenborough v. S. Katherine's Dock Co.*, 3 C. P. D. 450, 464, C. A. See further on this subject, *Cundy v. Lindsay*, 3 Ap. Ca. 463, 464, *per* Ld. Cairns, C.

As to the vendor's election to affirm or determine the contract, see *Clough v. L. & N. W. Ry. Co.*, L. R., 7 Ex. 26, Ex. Ch. But, to give such rights to a *bonâ fide* pawnee or buyer from one A., who has obtained goods by fraud, it is necessary that the relation of seller and buyer should have subsisted between A. and the original seller. In *Kingsford v. Merry*, 1 H. & N. 503; 26 L. J., Ex. 83, Ex. Ch., the plaintiff sold, by a broker, goods at a wharf to A., who sold over to B. X. obtained from B. the broker's delivery order, addressed to the plaintiffs, on pretence of using it only to inspect the goods at the wharf for another purchaser, and he, N., thereupon produced the delivery order to the plaintiffs, and by falsely representing himself to be a sub-purchaser from B., obtained a warrant to the wharfinger to deliver to himself X., and thereupon got the goods transferred to the name of the defendant, as a security for money *bonâ fide* lent by defendant to X. in ignorance of the circumstances or of any fraud being committed; and it was held that, as there never was any contract as between the plaintiffs and X., it was a mere case of fraud by a stranger, who could convey no title to the defendant by a possession so obtained; but the Ex. Ch., in so deciding on the facts stated in the case on appeal, and reversing the judgment of the Exch., did not interfere with the proposition of law laid down by the latter court and above cited. See *The Marie Joseph*, *supra*, and *Henderson v. Williams*, *infra*. E. G., a clerk of the firm of G. & Co., without authority, bought goods from the plaintiffs in the name of G. & Co. Invoices for these goods were made out in the name of E. G. & Co., the plaintiffs believing that they were dealing with G. & Co. E. G. pledged the goods to the defendant a few days after they were delivered. It was held that the plaintiffs were entitled to recover, as there had never been a contract of sale to E. G. *Hardman v. Booth*, 1 H. & C. 803; 32 L. J. Ex. 105; *accord*. *Cundy v. Lindsay*, 3 Ap. Ca. 459, D. P. See also the observations of the Court in *Higgons v. Burton*, *supra*, and *Fowler v. Hollins*, L. R., 7 Q. B. 616, Ex. Ch.; L. R., 7 H. L. 757, *post*, p. 978, and *Farquharson v. King*, *ante*, p. 951.

Where one of two innocent persons must suffer from the fraud of a third, he shall suffer who *by his indiscretion* has enabled such third person to commit the fraud. *Henderson v. Williams*, (1895) 1 Q. B. 521, 529, C. A. See *Farquharson v. King*, (1902) A. C. 325, cited *ante*, p. 951, where the materiality of the words in italics is pointed out, *Id.* 332, *per* Ld. Halsbury, C., and see also *Id.* 342, *per* Ld. Lindley.

As to negotiable securities, *vide ante*, pp. 399, 400, and *post*, pp. 963 *et seq.*

Pledge—Factors Acts.] By the common law, an agent intrusted with goods cannot convey to a stranger a better right than he himself possesses, or is empowered to confer. See *Biggs v. Evans*, (1894) 1 Q. B. 88. "But if the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced *bonâ fide* to act on the faith of that apparent

authority, from denying that he had given such an authority, and the result to them was the same as if he had really given it. But there was no such preclusion against those who had notice that the real authority was limited." *Cole v. N. W. Bank*, L. R., 10 C. P. 351, 363, *per Blackburn, J.* To remedy this latter case, and other difficulties which arose out of dealings with agents, the three earlier Factors Acts, viz.:—1 G. 4, c. 83; 6 G. 4, c. 91; and 5 & 6 V. c. 39, were passed. The effect of these acts was, "that where a third person has intrusted goods, or the documents of title to goods, to an agent who, in the course of such agency, sells or pledges the goods, he should be deemed by that act to have misled any one who *bonâ fide* deals with the agent, and makes a purchase from or an advance to him without notice that he was not authorized to sell or procure the advance." S. C. *Id.* 372, *per Id.* See further the judgment of Willes, J., in *Fuentes v. Montis*, L. R., 3 C. P. 268, 275 *et seq.*; *Jewan v. Whitworth*, *Maenee v. Gorst*, and *Kaltenbach v. Lewis*, *post*, p. 958. These acts did not apply to a vendee in possession in his own right; *Jenkyns v. Osborne*, 7 M. & Gr. 678; *Van Casteel v. Booker*, 2 Exch. 691; nor to a paid vendor who had retained possession of the documents of title; *Johnson v. Credit Lyonnais Co.* and *Id. v. Blumenthal*, 3 C. P. D. 32, C. A.; nor to an agent whose authority to sell had been revoked before sale, and from whom the goods had been demanded by his principal. *Fuentes v. Montis*, L. R. 3 C. P. 268; Ex. Ch., L. R., 4 C. P. 93. The law in these cases was therefore amended by the Factors Act, 1877, 40 & 41 V. c. 39, so that possession of the goods, or of the documents of title to goods, in the hands of an agent whose authority had been revoked, or of a vendor or vendee under a sale or a contract for sale, should be sufficient to constitute agency under the previous acts, unless the person to whom any sale, pledge, or other dispositions was made, had notice of his real position.

The above acts have now been repealed, and the law on the subject consolidated and amended by the Factors Act, 1889, 52 & 53 V. c. 45, which is now the code of law on the subject. Its provisions are as follows:—

By the definition section (sect. 1), "for the purposes of this Act—(1.) The expression 'mercantile agent' shall mean a mercantile agent having in the customary course of his business, as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods: (2.) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf: (3.) The expression 'goods' shall include wares and merchandise; (4.) The expression 'document of title' shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented: (5.) The expression 'pledge' shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance, or of any further or continuing advance or of any pecuniary liability: (6.) The expression 'person' shall include any body of persons corporate or unincorporate."

A man employed by a firm of jewellers at a small salary, to sell goods for them by retail on commission, is not a "mercantile agent" within sub-sect. 1. *Hastings v. Pearson*, (1893) 1 Q. B. 62. Sub-sect. 3 does not include furniture placed by the agent in his house for safe custody; see *Wood v. Rowcliffe*, 6 Hare, 191; nor certificates of railway stock; see *Freeman v. Appleyard*, 32 L. J., Ex. 175. A second pledge of the same goods to a different person seems within sub-sect. 5; see *Portalis v. Tetley*, L. R., 5 Eq. 140.

As to dispositions by mercantile agents, *vide* sect. 1 (1), *supra*.

Sect. 2.—(1.) “Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him, when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same. (2.) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined. (3.) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner. (4.) For the purposes of this act the consent of the owner shall be presumed in the absence of evidence to the contrary.”

Under this section a mercantile agent in possession of goods with the consent of the true owner can, when acting in the ordinary course of business as a mercantile agent, confer a good title on a person taking the goods *bonâ fide*. It only applies when the person dealing with the goods is a mercantile agent, as defined by sect. 1 (1.), *ante*, p. 957; *Hustings v. Pearson*, *ante*, p. 957. In the former acts the expression “agent entrusted with the goods,” was used instead of “mercantile agent,” but the effect seems to be much the same. See *Hayman v. Flewker*, 13 C. B., N. S. 519, 527; 32 L. J., C. P. 132, 133, *per Cur.*; *Monk v. Whittenbury*, 2 B. & Ad. 484; *Wood v. Rowcliffe*, 6 Hare, 191; *Lamb v. Attenborough*, 1 B. & S. 831; 31 L. J., Q. B. 41; *Cole v. N. W. Bank*, L. R., 9 C. P. 470; Ex. Ch., L. R., 10 C. P. 334; *Johnson v. Credit Lyonnais Co.*, and *Id. v. Blumenthal*, 3 C. P. D. 32, C. A.; *Barrow v. City Bank*, 5 Ap. Ca. 664, D. P. The section gives protection to a *bonâ fide* pledgee or vendee where the agent is in possession of the goods, notwithstanding the principal was induced to consent to his being in possession, by his fraudulent misrepresentations. See *Sheppard v. Union Bank of London*, 7 H. & N. 661; 31 L. J., Ex. 154; *Baines v. Swainson*, 4 B. & S. 270; 32 L. J., Q. B. 281; *Vickers v. Hertz*, L. R., 2 H. L. Sc. 113. But not, it seems, where the possession has been obtained by a trick constituting larceny. *Oppenheimer v. Frazer*, (1907) 2 K. B. 50, C. A. See further on sect. 2. *S. C.* and *Id. v. Attenborough*, (1907) 1 K. B. 510.

Sect. 3. “A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.” This section applies only to a pledge by a mercantile agent. *Inghis v. Robertson*, (1898) A. C. 616, D. P.

Sect. 4. “Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.” See on this section *Jewan v. Whitworth*, L. R., 2 Eq. 692; *Macnee v. Gorst*, L. R., 4 Eq. 315; *Kaltenbach v. Lewis*, 10 Ap. Ca. 617, D. P.

Sect. 5. “The consideration necessary for the validity of a sale, pledge, or other disposition, of goods, in pursuance of this act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a

negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange."

Sect. 6. "For the purposes of this act an agreement made with a mercantile agent through a clerk or other person authorized in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent."

Sect. 7.—"(1.) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person. (2.) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition, by a mercantile agent."

The act also extends to certain dispositions by sellers and buyers of goods having possession of the goods or of the documents of title to them; its provisions are as follows:—

Sect. 8. "Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, *or under any agreement for sale, pledge, or other disposition thereof*, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same."

Sect. 9. "Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, *or under any agreement for sale, pledge, or other disposition thereof*, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

The provisions of sects. 8 and 9, *supra*, are re-enacted by the Sale of Goods Act, 1893, s. 25 (1, 2), omitting the paragraphs in italics. By *Id.* s. 25 (3), "In this section the term 'mercantile agent' has the same meaning as in the Factors Acts." See also definitions in sect. 62, *ante*, p. 521.

Sect. 9 applies although the sale to the vendee did not satisfy the requirements of the Sale of Goods Act, s. 4, and he can give to a *bonâ fide* purchaser, without notice, a title free from the original vendor's lien. See *Hugill v. Masker*, 22 Q. B. D. 364, C. A. So it applies although the vendee was in possession of the documents of title to the goods on the condition, which he has not fulfilled, that he should accept a bill of exchange for their price. *Cahn v. Pockett's Bristol, &c. Co.*, (1899) 1 Q. B. 643, C. A. A. being in possession of furniture under a hire and purchase agreement with the plaintiff L., sold and delivered the furniture to the defendant B. before the last instalment was due or had been paid. B. acquires a good title under sect. 9, if he took *bonâ fide* and without notice of L.'s title. *Lee v. Butler*, (1893) 2 Q. B. D. 318, C. A. So where A. delivered the furniture to H., an auctioneer, for sale, and he sold the furniture in good faith, and paid A. the proceeds. *Shenstone v. Hilton*, (1894) 2 Q. B. D. 452. But it is otherwise where A. had an option of terminating his agreement with L., by paying all

instalments due and returning the furniture, as in that case there is no agreement to buy. *Helby v. Matthews*, (1895) A. C. 471, D. P. See *McEntire v. Crossley*, *Id.* 467. See further on this section *Inglis v. Robertson*, (1898) A. C. 616, D. P.

As to sect. 10, which relates to the effect of transfer of documents on vendor's lien or right of stoppage in transitu, *vide post*, p. 992.

Sect. 11. "For the purposes of this act, the transfer of a document may be by endorsement, or, where the document is by custom or its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery."

Sect. 12.—"(1.) Nothing in this act shall authorize an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing. (2.) Nothing in this act shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged, any balance of money remaining in his hands as the produce of the sale of the goods, after deducting the amount of his lien. (3.) Nothing in this act shall prevent the owner of goods, sold by an agent, from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set off on the part of the buyer against the agent." See *Kaltenbach v. Lewis*, 10 Ap. Ca. 617, D. P., *ante*, p. 708.

Sect. 13. "The provisions of this act shall be construed in amplification and not in derogation of the powers exercisable by an agent independently of this act."

As to the construction of the former Factors Act, see 1 Smith's L. C. 11th ed. 761 *et seq.*

As to the title conferred by the pledge of negotiable securities, *vide ante*, pp. 399, 400, and *post*, pp. 963 *et seq.*

[*Stolen Goods.*] By the Sale of Goods Act, 1893, s. 22 (1), "Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller. (2.) Nothing in this section shall affect the law relating to the sale of horses."

Market overt in the country is only held on the special days provided for particular towns by charter or prescription, but in the city of London every day, except Sunday, is market day. In the country the market place is the only market overt, but in the city of London every shop in which goods are exposed publicly for sale, for such things only as the owner professes to trade in. 2 Bl. Coms. 449; *Market Overt, case of*, 5 Rep. 83. It is necessary that the goods should be openly exposed for sale in the market during the whole of the time that the bargain is made. C. had two shops in different parts of the city of London, and he bought by sample in one shop a quantity of stolen opium, which was delivered to him at the other shop; it was held that for the above reason he had acquired no title to the opium. *Crane v. London Dock Co.*, 5 B. & S. 313; 33 L. J., Q. B. 224. So where a jeweller purchased jewels in a show room over his shop, to which room customers were admitted by special invitation only, he acquired no title. *Hargreave v. Spink*, (1892)

1 Q. B. 25. And it seems that the city custom does not apply where the shopkeeper is the *purchaser* of the goods. S. C.

Where a man purchases stolen goods not in market overt, and after notice of their having been stolen, sells them in market overt, the owner may maintain trover against the first buyer. *Peer v. Humphrey*, 2 Ad. & E. 495; 2 Wms. Saund. 47 h. (p). It was formerly thought that trover would not lie against the thief or his accomplice until conviction. See *Stone v. Marsh*, 6 B. & C. 551, 564; *Chowne v. Baylis*, 31 Beav. 351; 31 L. J., Ch. 757. But, in *Wells v. Abrahams*, L. R., 7 Q. B. 554, this doctrine was altogether doubted. See further hereon, *Rooke v. D'Ariglor*, 10 Q. B. D. 412; *Ex pte. Bull*, 10 Ch. D. 667, C. A.; *Midland Insur. Co. v. Smith*, 6 Q. B. D. 561; and *Appleby v. Franklin*, 17 Q. B. D. 93. And it was always held to lie against an innocent party, who had taken or bought the goods (not in market overt), without such conviction. *White v. Spettigue*, 13 M. & W. 603; *Lee v. Bayes*, 18 C. B. 599; and see *Osborn v. Gillett*, L. R., 8 Ex. 88.

The sale of horses is excepted from the operation of sect. 22; such sale is regulated by the stats. 2 & 3 P. & M. c. 7, and 31 El. c. 12; and the property in a horse, even though sold in market overt, does not pass to the buyer, unless the formalities directed by those statutes are complied with. 2 Inst. 713 *et seq.* The case of *Lee v. Bayes*, *supra*, where it was held that a sale by public auction at a horse repository, out of the city of London, is not a sale in market overt, appears to have been decided irrespectively of those statutes.

If goods stolen are pawned, the owner may maintain trover against the pawnbroker; *Pucker v. Gillies*, 2 Camp, 336, n.; and without tendering the duplicate, or making a declaration under the Pawnbrokers Act, 1872 (35 & 36 V. c. 93), for the provisions of sects. 25 *et seq.* impose restrictions upon the right of the pawner, and persons claiming under him only, to obtain a return of the pledge, and they do not affect the right of the true owner, whose goods have been stolen and pledged adversely to him, to recover them from the pawnbroker; *Singer Manufacturing Co. v. Clark*, 5 Ex. D. 37, even although an order for restitution on terms, has been made under sect. 30, not at the owner's instance. *Leicester v. Cherryman*, (1907) 2 K. B. 101. The act does not apply at all to loans exceeding 10l. See sect. 10.

The stat. 24 & 25 V. c. 96, s. 100, enacts with respect to stolen "property" (as to which see sect. 1, *infra*), that if the thief, &c., shall have been indicted by or on behalf of the owner of the property (or by the director of public prosecutions, with the assistance of the owner, stat. 42 & 43 V. c. 22, s. 7), and convicted, that "the property shall be restored to the owner." By sect. 1, "property" includes every description of real and personal property, money-debts, all deeds, &c., relating to the title to any property, or giving a right to recover, or receive any money or goods, and shall include not only such property as shall have originally been in the possession of any party, but any property into or for which the same may have been converted or exchanged, and anything acquired thereby immediately or otherwise. Sect. 100 enables the court, before whom the conviction shall have taken place, to award writs of restitution for the property, or to order the restitution thereof in a summary manner; but this remedy is cumulative, for the effect of the statute is to restore the right, and trover is maintainable even against a purchaser in market overt, without any order for restitution having been made. *Scattergood v. Sylvester*, 15 Q. B. 506; 19 L. J., Q. B. 447; *accord. Bentley v. Vilmont*, 12 Ap. C. 471, D. P. The section seems only to apply where the larceny is prosecuted under that Act. See *R. v. Jones*, 14 Cox, 528. Now by the Sale of Goods Act, 1893, s. 24 (1), "Where goods" (see sect. 62 (1), *ante*, p. 521) "have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen reverts in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with

them, whether by sale in market overt or otherwise." The 24 & 25 V. c. 96, s. 100, *ante*, p. 961, applied also where property had been obtained by false pretences, or by any felony or misdemeanor mentioned in the same statute, except in the case of a trustee, banker, &c., convicted of fraudulently dealing with goods or documents of title to goods entrusted to him,* and trover lay against a *bonâ fide* purchaser for value from a person who had a voidable title, by reason of his having obtained the goods fraudulently. S. C. Now, however, by the Sale of Goods Act, 1893, s. 24 (2), "Notwithstanding any enactment to the contrary, where goods" (see sect. 62 (1), *ante*, p. 521) "have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revert in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender." It will be noticed that while sect. 24 is general and applies to all larcenies, it does not apply to things in action or money; hence as regards these the provisions of 24 & 25 V. c. 96, s. 100, are still in force. As to the recovery of negotiable instruments and money, *vide post*, p. 963. A conviction by a court of summary jurisdiction, acting under the Summary Jurisdiction Act, 1879 (42 & 43 V. c. 49), has the same effect as a conviction for the offence on indictment; sect. 27 (3).

It was decided that trover lay under the now repealed stat. 21 H. 8, c. 11, for money obtained by the sale of stolen goods; *Harris' case*, Noy, 128; for gold stolen and changed into silver; *Hanberries' case*, cited in *Holliday v. Hicks*, Cro. Eliz. 661; and for goods purchased with stolen money. *Golightly v. Reynolds*, Loft, 88. In *R. v. Powell*, 7 C. & P. 640, an order was made for the restitution of a horse bought with the proceeds of a stolen bill. See also *R. v. Central Criminal Court Justices*, 17 Q. B. D. 598; 18 Q. B. D. 314, C. A. An order for the restitution of a gold 5*l.* piece, which, though a current coin, had never been put in circulation, but had been sold by the thief as a curiosity, was upheld. *Moss v. Hancock*, (1899) 2 Q. B. 111.

Where A., in market overt, buys goods which have been stolen from the plaintiff, and resells them before the conviction of the thief, though with notice of the robbery, he is not liable in trover. *Horwood v. Smith*, 2 T. R. 750. So A., *bonâ fide* purchaser of goods which had been obtained by B. by false pretences, and re-sold by A. before B.'s conviction, was not liable; *Lindsay v. Cundy*, 1 Q. B. D. 348; for in these cases the property vested in A. by the sale, and on the conviction, the property reverted in the owner, but not by relation, as from the time of the theft or fraudulent taking from him. S. C.; *accord.* *Bentley v. Vilmont*, 12 Ap. Ca. 480, *per* Ld. Bramwell. See also *Walker v. Matthews*, 8 Q. B. D. 109. The judgment in *Lindsay v. Cundy*, *supra*, was reversed on the view of the facts taken by the C. A. & D. P. (2 Q. B. D. 96; *sub nom.* *Cundy v. Lindsay*, 3 Ap. Ca. 459), but they expressed no opinion on the construction of this statute. See 12 Ap. Ca. 478, 479, *per* Ld. Watson. In trover for stolen property it does not seem to be necessary for the plaintiff to show the mode in which it was lost or stolen. *Down v. Halling*, 4 B. & C. 344.

By 60 & 61 V. c. 30, s. 1 (1), where property has come into the hands of the police on a criminal charge, or under certain statutes, a court of summary jurisdiction may make an order for delivery to the person appearing to be the owner thereof, or if he cannot be found, such order in relation thereto as may seem meet; (2) such order shall not affect the right of any person to take, within six months from the date of the order, legal proceedings against any person in possession of property delivered by virtue of the order, for the recovery of the property, but on the expiration of those six months the right shall cease.

* Under sects. 75, 76, now replaced by 1 E. 7, c. 10, s. 1, see *Id.* s. 2.

Stolen Goods—Negotiable instruments—Money.] The property in a bank note, like that in cash, passes by delivery, and a party taking it *bonâ fide*, and for value, is entitled, at common law, to retain it as against a former owner from whom it has been stolen. *Miller v. Race*, 1 Burr. 452; 1 Smith's L. C. The same rule applies to negotiable instruments, and under this head are included all instruments which are by the custom of trade transferable in this country, like cash, by delivery, and are capable of being sued upon by the person holding them *pro tem.*; but if either of these requisites is wanting the transferee will not have a better title to it than the transferor, if the sale be made out of market overt. 1 Smith's L. C. 11th ed. 473; cited in *Crouch v. Credit Foncier*, L. R., 8 Q. B. 374, 381, *per cur.*

The following instruments have by the custom of trade been held to be so transferable and therefore negotiable. The scrip of a foreign loan, by which the holder is to be entitled, on payment of the instalments, to delivery of definitive bonds of the foreign government; *Goodwin v. Roberts*, L. R., 10 Ex. 76, 337; 1 Ap. Ca. 476, D. P. The bond of an American Railway Company, whereby A. acknowledged itself to be indebted to S. & B. (trustees), or bearer in 200*l.* which A. would pay the holder, and promised also to pay interest in accordance with the annexed coupons which were "to bearer," the bond being one of a series which were secured by a mortgage of even date. *Venables v. Baring Bros.*, (1892) 3 Ch. 527. So debentures "to bearer" of an English Company; *Bechuanaland Exploration Co. v. L. Trading Bank*, (1898) 2 Q. B. 658; *Edelstein v. Schuler*, (1902) 2 K. B. 144; or of a foreign one, S. C. So the scrip certificates of shares to bearer in an English company. *Rumball v. Metropolitan Bank*, 2 Q. B. D. 194; and share warrants to bearer issued under the Companies Act, 1867, ss. 27, 28; *Webb v. Alexandria Water Co.*, 21 T. L. R. 572, June 1, 1905, K. B. D. These cases determine the principle that modern usage is sufficient to establish the negotiability of an instrument, overruling in this respect the judgment in *Crouch v. Credit Foncier*, *supra*; and the Courts will now judicially notice the negotiability of the instruments above mentioned. *Edelstein v. Schuler*, *supra*.

But instruments negotiable abroad are not so here in the absence of a custom of merchants in this country to treat them as negotiable. *Picker v. L. & County Banking Co.*, 18 Q. B. D. 515, C. A. An American railway share certificate issued in the name of A. B., and having a form of transfer indorsed on it signed in blank by A. B., is not negotiable, though so treated in the English stock-markets, for the transfer of the shares can only be made by entry on the railway register. *L. & County Banking Co. v. L. & R. Plate Bank*, 20 Q. B. D. 232 (there was no appeal on this point); *Colonial Bank v. Cady*, 15 Ap. Ca. 267, D. P. An unsigned post-office order for money in the hands of a banker for collection by him is not negotiable. *Fine Art Soc. v. Union Bank*, 17 Q. B. D. 705, C. A.

The transferee, B., of a negotiable security takes no better title than that of the transferor, A., if B. had, at the time of the transfer, notice that A. had no right to give B. a perfect title. *Sheffield, El. of v. L. Joint Stock Bank*, 13 Ap. Ca. 333, D. P.

It would seem that a *bonâ fide* belief by B. that A. had *by law* an authority to transfer a negotiable instrument, which B. knew did not belong to A., gives B. no better title than A. had, for the maxim "*Ignorantia juris non excusat*" applies; S. C. *Id.* 339, 340, *per* Ld. Halsbury, C. It is, however, settled that it is otherwise where B. believed that A. had such authority *in fact*; for the receipt of a negotiable instrument under the *bonâ fide* belief that a person dealing with it, though not the owner, had in fact the authority of the owner, confers a good title. *Foster v. Pearson*, 1 Cr. M. & R. 849 (explaining *Haynes v. Foster*, 2 Cr. & M. 237); *L. Joint Stock Bank v. Simmons*, (1892) A. C. 201, D. P. reversing S. C., (1891) 1 Ch. 270, in C. A., it having

been there decided on *dicta* in *Sheffield, El. of v. L. Joint Stock Bank*, *ante*, p. 963, which are to be explained as having reference to the special facts of that case; see judgments in *L. Joint Stock Bank v. Simmons*, *ante*, p. 963, in *D. P.* and *Bentinck v. L. Joint Stock Bank*, (1893) 2 Ch. 120. See further on this principle, cases cited *ante*, pp. 399, 400, and *Thomson v. Clydesdale Bank*, (1893) A. C. 282, D. P., cited *ante*, p. 605.

The 24 & 25 V. c. 96, s. 100, *ante*, p. 961, contains a proviso, "that if it shall appear, before any award or order made, that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been *bonâ fide* taken or received by transfer or delivery by some person or body corporate, for a just and valuable consideration without any notice or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the court shall not award or order the restitution of such security." This proviso cuts down the general right of property restored by the earlier part of the section to the owner on the conviction of the thief (*vide ante*, p. 961), and protects the *bonâ fide* holder for value of a negotiable instrument against all proceedings for its recovery. *Chichester v. Hill*, 52 L. J., Q. B. 160. And *semble*, the effect of sect. 100, "so far as money is concerned, is limited to cases where the money stolen or the proceeds of it are found on the thief, or in the possession of some one taking from him otherwise than as money passing as currency," even although the stolen coin is capable of identification. *Moss v. Hancock*, (1899) 2 Q. B. 119, 120, *per* Channell, J.

Property vesting under execution or award.] At common law the goods of an execution debtor are bound by the writ of execution from the time of its *teste*. But, by the Sale of Goods Act, 1893, s. 26 (1), "A writ of *fiery facias* or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed;" . . . "Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff. (2.) In this section the term 'sheriff' includes any officer charged with the enforcement of a writ of execution." This section replaces the Stat. of Frauds (29 C. 2, c. 3), s. 16 (s. 15 in Stat. of the Realm), and 19 & 20 V. c. 97, s. 1. A delivery of the writ to the sheriff's deputy in London is a delivery to the sheriff. *Harris v. Lloyd*, 5 M. & W. 436. As to the effect of County Court process, see *Murgatroyd v. Wright*, (1907) W. N. 120, 2 K. B. 333. As far as relates to the debtor himself and to all others but purchasers, a writ of execution binds the party's goods from the time of its *teste*. 1 Wms. Saund. 219 f(8); *Houghton v. Rusby*, Skin. 257; *Hutchinson v. Johnston*, 1 T. R. 729, 731; *Ex pte. Williams*, L. R., 7 Ch. 314, 317 *per* Mellish, L.J. The *binding*, both in the case of the Crown and of a common person, relates only to the debtor himself and his acts, so as to vacate any intermediate assignment made by him, otherwise than in market overt. *Giles v. Grover*, 1 Cl. & F. 74; S. C., 9 Bing. 136; *per* Patteson, J.; *Woodland v. Fuller*, 11 Ad. & E. 867, *per* *Id.* But, the property in the goods is not altered by the writ until execution and sale by the sheriff. *Lucas v. Nockells*, 10 Bing. 182. Nor is the property altered even by actual sale under the writ, so long as anything remains to be done to distinguish the goods sold, as by separation and weighing, on a sale *per* ton. *Ward v. Dalton*, 7 C. B. 643. The law admits of inquiry into the fraction of a day, whether the writ of execution was delivered to the sheriff or not, before the

completion of the conveyance, or purchase. Where a judgment debtor, A., made an assignment of all his goods to two creditors, Y. and Z., for the benefit of all his creditors, after he had notice that a writ of *fi. fa.* had been delivered to the sheriff for execution against his goods; it was held that the property in the goods passed to Y. and Z. immediately on the execution of the assignment; but, that the notice to A. was also notice to Y. and Z., and therefore the goods were liable to seizure under the *fi. fa.* *Hobson v. Thelluson*, L. R., 2 Q. B. 642. The sheriff cannot make a valid sale of the execution debtor's goods before seizure. *Ex pte. Hall*, 14 Ch. D. 132, C. A. As to seizure see *Johnson v. Pickering*, 23 T. L. R. 579, E. S., 1907, *cor.* Laurance, J. By the Bankruptcy Act, 1883, s. 146, "the sheriff shall not, under a writ of *elegit*, deliver the goods of a debtor, nor shall a writ of *elegit* extend to goods." Where a sheriff has seized goods under a *fi. fa.*, and goes out of possession, whether he has abandoned possession is a question of fact. *Bagshawes v. Deacon*, (1898) 2 Q. B. 173, C. A. The sale by the sheriff under the execution confers a title only as to the goods of the execution debtor. *Crane v. Ormerod*, (1903) 2 K. B. 37, *per* Ld. Alverstone, C.J. So in the case of a sale, under the County Courts Act, 1888, s. 154, by the high bailiff of that Court. S. C. *Secus* where the owner has made a claim and the goods were sold under *Id.* s. 156. *Goodlock v. Cousins*, (1897) 1 Q. B. 558, C. A.

The property in goods does not pass by an award. *Hunter v. Rice*, 15 East, 100. It only gives a right of action or attachment (as the case may be) for non-performance of it.

[On administration to deceased owner.] As to the vesting of property of a deceased owner in his executor or administrator, *vide sub tit. Actions by executors, post*, p. 1151. Between the death of an intestate and grant of administration, his personal property was, by 21 & 22 V. c. 95, s. 19, vested in the judge of the Court of Probate for the time being, in the same manner, and to the same extent, as it used to vest in the Ordinary. It would seem that such property now vests in all the judges of the High Court. See J. Act, 1873, ss. 16, 31, 34, 76: *De Leon v. Hubbard*, (1883) W. N. 197, *cor.* Field, J.; and *cf.* *Wilson v. Wilson*, 9 P. D. 8, C. A.

[Previous recovery in trover, or detinue, or for money had and received.] A recovery in trover vests the property in the chattel in the defendant as against the plaintiff; *Adams v. Broughton*, Stra. 1078; *Cooper v. Shepherd*, 3 C. B. 266; but not unless the judgment is followed by satisfaction; *Brinsmead v. Harrison*, L. R., 6 C. P. 584; this is then equivalent to a purchase of the goods at the value assessed by the jury. S. C., *Id.* 588; *semb. accord.* S. C. in Ex. Ch., L. R., 7 C. P. 554, 555. This case overrules the dictum of Jervis, C.J., in *Buckland v. Johnson*, 15 C. B. 145; 23 L. J., C. P. 204, that by the mere recovery, the property was vested in the defendant by relation, from the time of the conversion; see also *Marston v. Phillips*, 9 L. T. 289, M. T. 1863, Q. B. So, where the damages were not estimated on the footing of the full value, which it seems may be shown in a reply to a defence stating the former recovery, the judgment does not vest the property in the defendant. *Holmes v. Wilson*, 10 Ad. & E. 503, 511, n.; see 2 Wms. Saund. 47 cc, *dl* (z). A judgment in detinue is in the same position as a judgment in trover. *Ex pte. Drake*, 5 Ch. D. 866.

Judgment for the plaintiff in replevin in the *detinet* for damages vests the property of the goods in the defendant. *Moore v. Watts*, 1 Ld. Raym. 614. Though it would seem to be otherwise, where the judgment is not followed by satisfaction, *vide supra*.

If after a wrongful sale of goods the owner elect to claim and accept part of the proceeds of the sale from the wrong-doer as money received to his

use, the tort is waived, and he cannot sue in trover. *Lythgoe v. Vernon*, 5 H. & N. 180; 29 L. J., Ex. 164; see further *ante*, p. 617, and cases there cited.

Title acquired abroad.] "An assignment of a moveable chattel which can be touched (goods), giving a good title thereto according to the law of the country where the moveable is situate at the time of assignment (*lex situs*), is valid." Dicey's Conflict of laws, Rule 140, approved in *Embiricos v. Anglo-Austrian Bank*, (1905) 1 K. B. 677, C. A., and there applied to the case of a cheque stolen, and its indorsement forged abroad.

Evidence of special property.] It is sufficient for the plaintiff to prove that he has a special property, as against the defendant, in the goods converted. Thus a bailee, *Nicolls v. Bastard*, 2 C. M. & R. 659; a sheriff when he has taken goods in execution, B. N. P. 33; (but not before, *Ex pte. Williams*, L. R., 7 Ch. 314); the agister of cattle, Br. Abr. Tresp. 67; the lord who seized an estray or wreck before the year and day expired, B. N. P. 33; may all maintain this action. So, if a house be blown down and a stranger take away the timber, the lessee for life may bring trover, for he has a special property to make use of the same in rebuilding. *Id.* As to the property of the lord in heriots, see 2 Wms. Saund. 168 (1). *Abington v. Lipscomb*, 1 Q. B. 776; *Western v. Bailey*, (1897) 1 Q. B. 86, C. A. In some cases, a person who has only a special property may maintain trover, although he has never had actual possession; thus a factor to whom goods have been consigned, but by whom they have never been received, may bring trover for them; *per Eyre, C.J.*, *Fowler v. Down*, 1 B. & P. 47. The consignee of goods, consigned as a mere security to meet bills accepted by him for the consignor, may bring trover, although no bill of lading has been executed. *Evans v. Nichol*, 3 M. & Gr. 614. And, where the consignor of goods, hearing that the consignee had stopped payment, indorsed the bill of lading to the plaintiff, without consideration, directing him to take possession of the goods, and the plaintiff demanded the goods from the defendants (wharfingers), who refused to deliver them, it was held that the plaintiff had such a special property as entitled him to maintain trover. *Morison v. Gray*, 2 Bing. 260; *Sargent v. Morris*, 3 B. & A. 277. Special property may be sufficient to support an action even against the owner of the goods; thus, where a person entitled to the temporary possession of a chattel, delivers it to the general owner for a special purpose, he may, after that purpose is satisfied, and on the refusal of the general owner to return it, maintain trover against him for it. *Roberts v. Wyatt*, 2 Taunt. 268. So N., the owner of a chattel, may, by agreement with his co-owner, F., have a special property in it, which will entitle N. to recover it from H., with whom F. had wrongfully pledged it. *Nyberg v. Handelskar, post*, p. 996. But, it has been held that a landlord, who distrains and impounds goods, has not such a special property as will enable him to maintain trover; for he has only a pledge, with a statutory power to sell; *Moneux v. Goreham*, 2 Selw. N. P., 10th ed. 1351; and, the goods when impounded are not in the possession of the landlord, but in the custody of the law between the parties. *R. v. Cotton*, Parker, 121. The proper remedy is by action for pound breach. See *Turner v. Ford*, 15 M. & W. 212, *per Parke, B.*

Where either the general or the special owner may maintain trover, judgment obtained by one is a bar to the action of the other. 2 Wms. Saund. 47 i, (1).

Evidence of property—what sufficient against a wrong-doer.] Where the action is brought against a mere wrong-doer, it will be sufficient for the plaintiff to show that he was in possession of the property. *Jeffries v. Cit. W.*

Ry. Co., 5 E. & B. 802; 25 L. J., Q. B. 107. See *The Winkfield*, (1902) P. 12, 55, C. A., cited *ante*, p. 782. Thus, where a chimney-sweeper's boy found a jewel, and took it to a jeweller, who refused to return it, it was held that the finder had such a property as would enable him to keep it against all but the rightful owner, and that he might maintain trover. *Armory v. Delamirie*, Str. 505; 1 Smith's L. C. So, the finder of goods, though picked up by him in the shop of a third person. *Bridges v. Hawkesworth*, 21 L. J., Q. B. 75. Though it would have been otherwise, as against an innkeeper, if found in his inn, by reason of his special property. *Id. per* Patteson, J. And the owner of land is generally entitled to chattels found on the land. *S. Staffordshire Water Co. v. Sharman*, (1896) 2 Q. B. 44. The plaintiff bought a stranded vessel, which was not conveyed to him according to the provisions of the Registry Acts, and took possession of her; part of the wreck drifted upon the defendant's premises, and was seized by him; it was held that plaintiff had a sufficient property to maintain this action. *Sutton v. Buck*, 2 Taunt. 302. Where a fire had broken out in a warehouse containing tallow belonging to different persons, which was melted, and flowed into the Thames; the plaintiff collected a quantity of this tallow, which was taken from him by a constable, and sold by order of the Commissioners of Police to the defendants, under 2 & 3 V. c. 71, s. 30, before the 12 months thereby limited had expired; it was held that the plaintiff had no property entitling him to maintain trover against the defendant. *Buckley v. Gross*, 3 B. & S. 566; 32 L. J., Q. B. 129. So where on the hearing of a charge of theft, the stolen goods are produced by O., a purchaser from the thief, under a *subpoâ duces tecum*, O.'s possessory title has been said to be displaced. See *R. v. Lushington*, (1894) 1 Q. B. 420. Where the owner of furniture lent it to the plaintiff under a written agreement, and the plaintiff placed it in a house occupied by the wife of C., a bankrupt, it was held that the plaintiff might recover in trover against C.'s assignees, and without producing the agreement. *Burton v. Hughes*, 2 Bing. 173. A licensee by parol to mine, has possession of the gravel or earth dug up, as against a wrong-doer. *Northam v. Bowden*, 11 Exch. 70; 24 L. J., Ex. 237. In trover for ore, it was proved that the plaintiff was in possession of land in which he raised the ore in question: held, that this was *primâ facie* evidence of the plaintiff's right to the ore, although the same witness, on cross-examination, proved that the ore was taken by a person who had a shaft in an adjoining close, and was getting the same lode of ore under the plaintiff's land where he had sunk his shaft. *Rowe v. Brenton*, 8 B. & C. 737. In such an action it is enough to show occupation, without proving the title of the lessors under whom the plaintiff claims; and it is not any answer that some of the lessors named in the lease have not executed it; for this, if material at all, is only evidence in reduction of damages. *Taylor v. Parry*, 1 M. & Gr. 604. The owner of a ship, when the cargo is put on board, is *primâ facie* owner of the cargo, so as to sue a wrong-doer in trover. *Branker v. Molyneux*, 3 M. & Gr. 84. A married woman, P., living separate from her husband, as housekeeper to F., gave the plaintiff, her niece, a watch, which she handed to F. to keep for her; F. and P. died, and the defendants, the executors of F., took possession of the watch; it was held that the plaintiff had a sufficient possessory right to maintain trover against the defendants, though she had perhaps no right as against P.'s husband. *Bourne v. Fosbrooke*, 18 C. B., N. S. 565; 34 L. J., C. P. 164.

[*Evidence of right of possession.*] The plaintiff must show that he has a right to the immediate possession of the goods, in order to recover in this action. Thus, the purchaser of goods, not sold on credit, has no right of possession until he pays or tenders the price. *Bloxam v. Sanders*, 4 B. &

C. 941. And see Sale of Goods Act, 1893, ss. 27, 28, *ante*, p. 523. But, where a tender of the price has been made, though after the time fixed for completion of the purchase, the vendor will be liable in trover if he refuse to deliver the goods. *Martindale v. Smith*, 1 Q. B. 389; and see *Page v. Cowasjee*, L. R., 1 P. C. 127, 145, and Sale of Goods Act, 1893, s. 10 (1), *ante*, p. 542. A quantity of hops was purchased from the defendant, the invoice of which contained the words "on rent"; the hops remained in the seller's warehouse, and an acceptance of the buyer was afterwards given for the price, to the seller at his request, which he indorsed on getting it discounted; during the running of that bill, part of the hops was delivered, in pursuance of the buyer's order, to his sub-purchaser who paid the warehouse rent, *pro tanto*, charged by the seller; afterwards, and before the bill became due, the original buyer became bankrupt, and it was dishonoured at maturity; it was held, that his assignees could not maintain trover for the hops, without actual payment of the price agreed on, the buyer having only the right of property, without that of possession. *Miles v. Gorton*, 2 Cr. & M. 504; *Grice v. Richardson*, 3 Ap. Ca. 319, J. C. So, where there is a contract to supply goods by instalments, and the buyer becomes insolvent before all the instalments have become due, the seller is not bound to deliver a further instalment of the goods until tender of the price of those delivered and of that instalment, has been made him; *Ex pte. Chalmers*, L. R., 8 Ch. 289, followed in *Morgan v. Bain*, L. R., 10 C. P. 15; even though the seller had taken a bill for the price. *Gunn v. Bolckow, Vaughan & Co.*, L. R., 10 Ch. 491. The seller, having a lien for the price, permitted the buyer to have a key of the part of the seller's premises on which the goods were to remain till payment, the seller retaining a general control over the premises as before; held, that this was not such a possession by the buyer, as to support trover against the seller, for a wrongful removal of the goods. *Milgate v. Kebble*, 3 M. & Gr. 100. A. made an assignment of goods by deed to secure a debt, with a covenant to pay it on demand, and in the meantime to remain in possession till default; it was held that, before demand of the debt, the assignee could not maintain trover. *Bradley v. Copley*, 1 C. B. 685. It is otherwise, however, where a right to the immediate possession of the goods passed to the plaintiff by the assignment, although such right be incumbered by a trust not inconsistent with such possession; *White v. Morris*, 11 C. B. 1015; 21 L. J., C. P. 185; for in such case the possession of the *cestui que trust* is the possession of the trustee. *Barker v. Furlong*, (1891) 2 Ch. 172. See further *Manders v. Williams*, and *Jelks v. Hayward*, cited *ante*, p. 948, and *Toms v. Wilson*, *Brightly v. Norton*, and *Belding v. Read*, cited *ante*, p. 955. When the assignor wrongfully sold the goods, which he had assigned to secure a debt, so that he could not deliver them on demand, the assignee was held entitled to recover their value in trover even against the *bonâ fide* purchaser. *Cooper v. Willomatt*, 1 C. B. 672; *Fenn v. Bittleston*, 7 Exch. 152; 21 L. J., Ex. 41; *Consolidated Co. v. Curtis*, (1892) 1 Q. B. 495. "The rule is, that where there has been a misuser of the thing lent, as by its destruction or otherwise, there is an end of the bailment, and the action for trover is maintainable for the conversion." *Bryant v. Wardell*, 2 Exch. 479, 482. Where a father gave to his son, aged 16, a watch and certain books and wearing apparel, it was ruled that the right of possession was in the son, and that the father could not maintain trover for them, although perhaps it might have been otherwise in the case of a child of tender age. *Hunter v. Westbrook*, 2 C. & P. 578.

[*Fixtures.*] The reversioner or person entitled to the freehold of lands on lease may bring trover for fixtures after severance from the demised land.

Thus, where certain mill machinery, together with a mill, had been demised for a term to a tenant, who, without permission from his landlord, severed the machinery from the mill, and it was afterwards sold by the sheriff under a *fi. fa.*, it was held that no property passed to the vendee, and that the landlord might bring trover for the machinery even during the continuance of the term. *Farrant v. Thompson*, 5 B. & A. 826. So, where lands are leased for years, and a tree is cut down by a stranger during the term, the landlord may maintain trover for it; for, when it is severed, the special property of the lessee is determined. *Berry v. Heard*, Cro. Car. 212. See further, cases cited *ante*, p. 925. But, trover cannot be maintained by a tenant in tail, expectant on the determination of an estate for life without impeachment of waste, for timber which grew upon and was severed from the estate; for the tenant for life has a right to the trees the moment they are cut down. *Pyne v. Dor*, 1 T. R. 65; and see *Williams v. Williams*, 12 East, 209; *Channon v. Patch*, 5 B. & C. 897; and *In re Barrington*, 33 Ch. D. 523 (minerals). The lessor may recover from the lessee a prehistoric chattel which the latter has dug out of the demised land. *Elwes v. Brigg Gas Co.*, *Id.* 562.

A tenant's right to remove fixtures is a power coupled with an interest; *Pool's case*, 1 Salk. 368; *Minshall v. Lloyd*, 7 M. & W. 450, 460; and is assignable by deed. *London & Westminster Loan Co. v. Drake*, 6 C. B., N. S. 798; 28 L. J., C. P. 297. The tenant must, according to the old authorities, exercise his power during the continuance of his term; 20 H. 7, f. 13 b; 21 H. 7, f. 27 a, *per* Kingsmill, J.; *Lyde v. Russell*, 1 B. & Ad. 394; *Pugh v. Arton*, L. R., 8 Eq. 626; and it is well settled that he must, at any rate, do so during such further period as he may hold possession, after the term, in the capacity of a tenant; *Penton v. Robart*, 2 East, 88; *Mackintosh v. Trotter*, 3 M. & W. 184; *Weeton v. Woodcock*, 7 M. & W. 14; *Roffey v. Henderson*, 17 Q. B. 574; 21 L. J., Q. 49; but, how far the tenant is entitled to this extended period is by no means certain. See *Heap v. Barton*, 12 C. B. 274; 21 L. J., C. P. 153, 154, *per* Jervis, C.J.; *Leader v. Homewood*, 5 C. B., N. S. 272. See also *Saint v. Pilley*, L. R., 10 Ex. 137. The rule has been held to be the same whether the term be determined by effluxion of time; *Lyde v. Russell*, *supra*; by surrender; *Ex pte. Stephens*, 7 Ch. D. 127, C. A.; *Ex pte. Brook*, 10 Ch. D. 100 C. A.; or, by forfeiture. *Weeton v. Woodcock*; *Pugh v. Arton*, *supra*. See, however, observations on this last case *In re Glusdir Copper Works*, *infra*. But, where a tenant was allowed by the terms of his tenancy to remove certain fixtures, he was held entitled to do so within a reasonable time after his landlord had given him notice of his election, to enter for a forfeiture. *Sumner v. Bromilow*, 34 L. J., Q. B. 130; *Ex pte. Gould*, 13 Q. B. D. 454. See the cases collected in the notes to *Elwes v. Mawc*, 2 Smith's L. C. Where the tenant has by deed, for valuable consideration, assigned to a third person A. his right to remove the fixtures, he cannot subsequently defeat the grant by a surrender of his lease to the landlord, and A. may recover the value of the fixtures in an action against the new tenant, who has refused to allow A. to enter and sever the fixtures. *L. & Westminster Loan Co. v. Drake*, *Saint v. Pilley*, *supra*. The forfeiture of a lease by the voluntary liquidation of the lessee company, is, as regards debenture holders, for whom the company's property has been assigned, equivalent to a surrender. *In re Glusdir Copper Works*, (1904) 1 Ch. 819. A grant of growing crops is similar in this respect to a grant of fixtures. *Clements v. Matthews*, 11 Q. B. D. 808, C. A. But unless the assignee exercise his right to enter and sever within a reasonable time, the fixtures will pass to the landlord. *Moss v. James*, 47 L. J., Q. B. 160; affirm. 38 L. T. 595, T. S. 1878, C. A.

As to what fixtures a tenant is entitled to remove, see *Elwes v. Maww*, 2 Smith's L. C., and cases cited *ante*, p. 925. Where A. the lessee of an unfurnished house was restrained, by the covenants in his lease from removing locks, keys, bars, bolts, chimney-pieces, slabs, and other fixtures and articles in the nature of fixtures, fixed or fastened during the term, and the premises were afterwards finished and fitted up as a tavern, and an ornamental marble chimney-piece was put up by him, it was held, that A. was not restrained from removing the trade fittings, or even tenant's fixtures, or the marble chimney-piece, at the end of the term; for the general words of the covenant are to be limited to fixtures of the same kind as those which precede them, *i.e.* to fixtures other than trade or tenant's fixtures, and introduced *ex majori cautela*. *Bishop v. Elliott*, 11 Exch. 113; 24 L. J., Ex. 229, Ex. Ch.; *Dumergue v. Runsey*, 2 H. & C. 777; 33 L. J., Ex. 88, Ex. Ch.; *Sumner v. Bromilow*, *supra*; *Acc. Lambourn v. McLellan*, (1903) 2 Ch. 268, C. A. A ladder fixed to the ground and to a beam above, and which was the only means of access to a room above; a crank nailed at top and bottom to keep it in its place, but not let into the wall; and a bench nailed to the wall, were all held not to be goods and chattels for which trover would lie after the expiration of the term. *Wilde v. Waters*, 16 C. B. 637; 24 L. J., C. P. 193. Valuable tapestries affixed by a tenant for life to the walls of a house for ornament, and the better enjoyment of them as chattels, so that they can be removed without structural damage, are removable by her executor. *In re De Falbe*, (1901) 1 Ch. 523; *affirm. sub. nom. Leigh v. Taylor*, (1902) A. C. 157. See also *In re Hulse*, (1905) 1 Ch. 406. As to the materiality of the intention of the affixing of the fixtures, *vide* S. C.C., *Hobson v. Gorringe*, and *Reynolds v. Ashby & Son*, *infra*.

As between mortgagor and mortgagee the fixtures annexed to the land pass to the mortgagee, although they can be removed without appreciable damage to the freehold, and there is no distinction between fixtures removable as between landlord and tenant and fixtures not so removable; for in this case the maxim, *quicquid plantatur solo, solo cedit*, applies in full force; *Walmsley v. Milne*, 7 C. B., N. S. 115; 29 L. J., C. P. 97; *Olinic v. Wood*, L. R., 3 Ex. 257; L. R., 4 Ex. 328, Ex. Ch.; *In re Richards*, L. R., 4 Ch. 630; *Holland v. Hodgson*, L. R., 7 C. P. 328, Ex. Ch.; *Smith v. Maclure*, (1884) W. R. 14; 32 W. R. 459; *Sheffield, &c. Building Soc. v. Harrison*, 15 Q. B. D. 358, C. A. Even where trade fixtures are put up by the mortgagor after the mortgage, they do not pass to his trustee in bankruptcy. *Walmsley v. Milne*, *supra*; *Longbottom v. Berry*, L. R., 5 Q. B. 123; *Meux v. Jacobs*, L. R., 7 H. L. 481. The rule is the same whether the mortgage be a legal one or merely equitable; S. C.; *Longbottom v. Berry*, *supra*; *Tebb v. Hodge*, L. R., 5 C. P. 73, Ex. Ch.; and whether the mortgagor be a freeholder or leaseholder of the mortgaged premises. *In re Richards*, L. R., 4 Ch. 630, 637; *Meux v. Jacobs*, *supra*. See also *Southport, &c. Banking Co. v. Thompson*, 37 Ch. D. 64. In determining whether a chattel has become a fixture or not, the intention of the person affixing it to the soil is material only so far as it can be presumed from the degree and object of the annexation. *Hobson v. Gorringe*, (1897) 1 Ch. 182, C. A.; *Reynolds v. Ashby & Son*, (1903) 1 K. B. 87, C. A.; (1904) A. C. 466, D. P. Thus where the fixtures had been supplied to the mortgagor K. by H., under a hire-purchase contract, and the mortgagee G. entered before K. had paid H. all the instalments payable thereunder, G. was held entitled to the fixtures. S. C.C. Where however H. retook the fixtures before G.'s entry, H.'s title was held good. *Gough v. Wood*, (1894) 1 Q. B. 713, C. A. In order that a chattel should become a fixture it is not essential that it should be physically attached to the soil on which it rests by its own weight. *Monti v. Barnes*, (1901) 1 K. B. 205, C. A.

The fact that by the mortgage deed the mortgagor in possession, for the better securing the mortgaged interest, attorned tenant to the mortgagee, does not affect the right of the mortgagee to the fixtures. *Ex pte. Punnett*, 16 Ch. D. 226. But where a mortgagor in possession lets the mortgaged premises, the tenant may remove the trade fixtures which he himself puts up. *Sanders v. Davis*, 15 Q. B. D. 218. And chairs, let by their owner L., to the owner and occupier of a hippodrome for use therein, and which were screwed down to the floor thereof, were held not to pass to the mortgagee of the building, as against L. *Lyon v. L. City, &c., Bank*, (1903) 2 K. B. 135. As to distraining fixtures, *vide ante*, p. 903.

Evidence of conversion.] The *gist* of the action is the wrongful conversion of the plaintiff's goods by the defendant. A conversion, however, does not, *ex vi termini*, imply a transfer of property to the defendant, but rather a deprivation of property suffered by the plaintiff. *Keyworth v. Hill*, 3 B. & A. 687. See *England v. Cowley*, L. R., 8 Ex. 126. A conversion may be proved either by evidence of a direct act of conversion, or by showing a demand of the goods by the plaintiff, and a refusal by the defendant to deliver them, which is evidence of one. As to the distinction between an actual conversion and what is evidence of one, see judgments in *Burroughes v. Bayne*, 5 H. & N. 296; 29 L. J., Ex. 185.

Evidence of conversion—actual or direct conversion.] An unlawful taking of goods out of the possession of the owner is itself a conversion, and not mere evidence of it. B. N. P. 44; 2 Wms. Saund. 47 n, (1); *Grainger v. Hill*, 4 N. C. 212; *Powell v. Hoglund*, 6 Exch. 67; 20 L. J., Ex. 82; provided the taking or detention be with intent to convert them to the use of the taker, or to some other person, or has the effect of destroying or altering their quality or nature; for if there be a trespass committed which does not interfere with the owner's general dominion over the property, this is no conversion. Therefore, where a ferryman, refusing to take a passenger's horses, removed them from the boat and put them at large ashore, this was held not to be in itself a conversion. *Fouldes v. Willoughby*, 8 M. & W. 540. See *per* Martin, B., in *Crouch v. Gt. N. Ry. Co.*, 11 Exch. 742; 25 L. J., Ex. 135, 147; and in *Burroughes v. Bayne*, 5 H. & N. 296, 300; 29 L. J., Ex. 185, 189; *Heald v. Carey*, 11 C. B. 977. In *Hiorf v. Bott*, L. R., 9 Ex. 86, 89, that which constitutes a conversion was described as "where a man does an unauthorized act, which deprives another of his property permanently, or for an indefinite time." A bankrupt might, under the early Bankruptcy Acts, maintain trover against his assignees in order to try the validity of the adjudication without proving a demand and refusal; for the taking of the goods by the assignees was a sufficient conversion, and the plaintiff must have been deemed to have delivered them on compulsion; *Summersett v. Jarvis*, 3 B. & B. 2; but, as under the Bankruptcy Act, 1883, s. 133, the advertisement in the *London Gazette* is made conclusive evidence of the appointment of the trustee, the action is not now brought, as was formerly done, to test the validity of the adjudication in bankruptcy. So, the using a thing without the licence of the owner may be a conversion. *Mulgrave v. Ogden*, Cro. Eliz. 219; *Keyworth v. Hill*, *supra*. Thus, the wearing of a pearl was held a conversion. *Petre, Ld. v. Heneage*, 12 Mod. 519. And where a person finds a thing and misuses it, it is a conversion. *Mulgrave v. Ogden*, *supra*. And, where a person coming to the possession of land, found there a block of stone belonging to another, and removed it, not to an adjacent place, but to a distance, it was ruled to be a conversion. *Forsdick v. Collins*, 1 Stark. 173; but see *Houghton v. Butler*, 4 T. R. 364. So, drawing part of the wine out of a vessel, and filling it up with water, is a

conversion of all the liquor. *Richardson v. Atkinson*, Stra. 576. But, it has been said by Patteson and Coleridge, JJ., that the conversion of *part* is not the conversion of the *whole*, if the remainder continues in a fit state to be delivered up, and the party offers to deliver it up. *Philpott v. Kelley*, 3 Ad. & E. 106. As to where trover will lie for wrongful distress, see *Action for wrongful distress*, ante, pp. 897, 899 *et seq.*

A person in the lawful possession of goods may be guilty of a conversion of them, by dealing with them contrary to the orders of the owner. Thus, where the owner of goods on board a vessel, directed the captain not to land them on a wharf against which the vessel was moored, which he promised not to do, but afterwards delivered them to the wharfinger, for the owner's use, under an idea that the wharfinger had a lien thereon, for the wharfage fees, because the vessel was unloaded against the wharf; it was held that the owner might, upon demand and refusal, maintain trover against the captain unless the latter could establish the wharfinger's right. *Syeds v. Hay*, 4 T. R. 260.

In order to constitute an actual conversion, it is not necessary that the party should deal with the goods as *his own*. It is enough if it be a dealing for a third person adversely to the true owner; thus, where a bankrupt, being indebted to G., delivered goods to G.'s servant, who gave a receipt for them in G.'s name, and sold them for his use; it was held, in an action by the assignee, that this sale was a conversion by the servant. *Perkins v. Smith*, 1 Wils. 328. So, where the plaintiff placed goods on board the defendant's ship as a consignment on behalf of D., and demanded bills of lading in his own name; the ship sailed without such bills having been given; it was held that this amounted to a conversion of the goods. *Falk v. Fletcher*, 18 C. B., N. S. 403; 34 L. J., C. P. 146. In this case the defendant, by his acts, showed that he set up a title in D., adverse to the plaintiff. But where the defendants by charter-party agreed to carry a cargo from C. to B., and the master refused to sign bills of lading and carried the cargo to B., and was ready to deliver it there to the consignee, it was held that there was no conversion. *Jones v. Hough*, 5 Ex. D. 115, C. A. The mis-delivery of goods by a warehouseman; *Devereux v. Barclay*, 2 B. & A. 702; or by a carrier; *Youl v. Harbottle*, Peake, 49; *Stephenson v. Hart*, 4 Bing. 476, is a conversion; though it is otherwise where he loses them by accident. 2 Wms. Saund. 47 *i* (1); *Ross v. Johnson*, 5 Burr. 2825; *Kirkman v. Hargreaves*, 1 Selwn. N. P., 13th ed. 364. As to delivery under an order which has been fraudulently altered, see *Union Credit Bank v. Mersey Docks, &c., Board*, (1899) 2 Q. B. 205. Proof that the carrier asserted that he delivered the goods to the consignee, and that the assertion is false, is not alone evidence of a conversion. *Attersol v. Briant*, 1 Camp. 409. If, however, the plaintiff has also proved a demand and a refusal by the party, whether consignor or consignee, entitled to have them, it would then have been evidence of a conversion. See further the observations of Martin, B., in *Crouch v. Gt. N. Ry. Co.*, 11 Exch. 442. But, delivery in the ordinary course of business at a place directed is no conversion, although the goods were delivered to a person not intended by the sender. *McKean v. McIvor*, L. R., 6 Ex. 36. And a carrier, after the refusal of goods at the consignee's address, is an involuntary bailee, and if he act with reasonable care and caution with respect to the goods, a mis-delivery of them by him will not be a conversion. *Heugh v. L. & N. W. Ry. Co.*, L. R., 5 Ex. 51. See further cases cited ante, p. 648. Where a landlord before the sale of distrained goods had notice from third persons, the plaintiffs, to deliver up the overplus to them as being the real owners, it was held no conversion for him to return the overplus and unsold goods to the tenant instead of the plaintiffs; for as to overplus, it should have been paid to the sheriff and not to the plaintiffs; and as to the goods,

they were rightly replaced where they were found. *Evans v. Wright*, 2 H. & N. 527; 27 L. J., Ex. 50. It seems, however, that as the sheriff now no longer takes part in the sale, the overplus should be returned to the real owner; *vide ante*, p. 898. Where goods of the plaintiff had, by mistake, been consigned to the defendant, and he by his act, though *bonâ fide*, enabled a third person to obtain delivery of the goods, whereby they were lost to the plaintiff, the defendant was held liable in trover. *Hort v. Bott*, L. R., 9 Ex. 86.

Taking the plaintiff's property by assignment from another who has no right to dispose of it, is a conversion; even after an interlocutory judgment in trover by the plaintiff against the assignor. *Marston v. Phillips*, 9 L. T. 289, M. T. 1863; see *ante*, p. 965. Therefore, where the defendant took an assignment of tobacco in the king's warehouse, by way of a pledge from a broker, who had purchased it in his own name for the plaintiff, his principal, it was held that he had been guilty of a conversion; it being also proved that, when the tobacco was demanded from him by the plaintiff, he refused to deliver it. *McCombie v. Davies*, 6 East, 538; *Baldwin v. Cole*, 6 Mod. 212; see also *Jackson v. Anderson*, 4 Taunt. 25. See also *Fowler v. Hollins*, L. R., 7 Q. B. 616; L. R., 7 H. L. 757, cited *post*, p. 978. But, where goods were placed in the hands of a factor for sale, and he indorsed the bills of lading to the defendants, who thereupon accepted a bill for him, and he at the same time directed the defendants to sell the goods, and reimburse themselves the amount of the bill out of the proceeds, it was held that the defendants having sold the goods, could not be sued for them in trover by the original owner. *Stiermell v. Holden*, 4 B. & C. 5. So where N. fraudulently obtained V.'s goods, and pledged them with B. for an advance, and before the fraud was discovered, repaid the advance and recovered possession of the goods, it was held that B. was not liable for conversion. *Union Credit Bank v. Mersey Docks, &c., Board*, (1899) 2 Q. B. 205. Where the defendant was intrusted by the plaintiff with a bill of exchange to get it discounted, and afterwards mis-applied the proceeds, it was held that trover would not lie against him. *Palmer v. Jarman*, 2 M. & W. 282. See *Symonds v. Atkinson*, 1 H. & N. 46. So where a broker, who is authorized to sell goods at a certain price, sells them at an inferior price, it is no conversion. *Dufresne v. Hutchinson*, 3 Taunt. 117.

A wrongful sale of goods is a conversion, and no demand is necessary. *Edwards v. Hooper*, 11 M. & W. 363. But a wrongful sale by one co-tenant is not a conversion as against the other, unless it be in market overt, or under such circumstances as wholly to deprive the other co-tenant of the power of retaking the goods. *Mayhew v. Herrick*, 7 C. B. 229; see further, *post*, pp. 978, 979. Where A. consigned the goods of B. to the defendant, who, without notice of the right of B., sold a part, and kept the remainder in his possession, the sale was held to be a conversion as against B. *Featherstonhaugh v. Johnston*, 8 Taunt. 237. A banker, B., discounted a bill, drawn on a customer, and accepted, payable at his bank, after notice that it had been lost by the holder, C.; B. afterwards debited his customer with the amount of the bill, wrote a discharge on it, and delivered it up to the customer as the voucher of his account; it was held that B. was guilty of an actual conversion and that C. could maintain trover against him for the bill, without making a demand. *Lovell v. Martin*, 4 Taunt. 799. If the holder of a bill for a specific purpose get money on it by discount without authority, this is a conversion of the whole, though he may have received only part of the money due on it; and the jury may give the whole amount as damages. *Alsager v. Close*, 10 M. & W. 576. So, where the drawer of a bill deposited it with a creditor, giving him authority to receive the proceeds and apply them in a specific

way; and the creditor, after the drawer had committed an act of bankruptcy, gave up the bill to the acceptor, and took another instead, this was held to be a conversion by him as against the assignees. *Robson v. Rolls*, 1 M. & Rob. 239.

Where the defendant, upon the security of two pictures, made an advance payable at a day certain, which was subsequently indefinitely extended, and the defendant afterwards wrote to the plaintiff, that if the money were not paid he should sell the pictures, mis-stating in his letter the amount of his claim; it was held that this inaccurate notice did not end the agreement, and that the defendant was liable in trover for selling the pictures. *Pigot v. Cubley*, 15 C. B., N. S. 701; 33 L. J., C. P. 134. C. deposited with the defendant the dock-warrant for a quantity of brandy, as a security for the payment of the acceptance of C. due January 29th. C. became bankrupt, and the defendant sold the brandy on the 28th, and handed over the warrant on the 29th, the vendee taking possession of the brandy on the 30th; it was held, that although the sale alone might not have operated as a conversion, yet that the delivery of the warrant interfered with the right of retaking possession of the goods, and afforded ground for an action of trover. *Johnson v. Stear*, 15 C. B., N. S. 330; 33 L. J., C. P. 130. But, where A. borrowed a sum of money from the defendant on his promissory note, payable on demand, and deposited scrip certificates for shares as a security: A. became bankrupt, and the defendant without any demand or notice sold 10 of the 15 shares to repay himself his debt; it was held that A.'s assignee could not, without having tendered the amount of the debt, maintain trover against the defendant to recover the value of the shares, for that, even assuming the sale to be wrongful, the immediate right to the possession was not, by the sale, re-vested in the plaintiff, and he could not therefore maintain trover, either for the whole value of the shares, or for nominal damages. *Halliday v. Holgate*, L. R., 3 Ex. 299, Ex. Ch.; following *Donald v. Suckling*, L. R., 1 Q. B. 585, where the form of action was detinue. In this last case Blackburn and Mellor, J.J., intimated that in *Johnson v. Stear*, *supra*, the action of trover should have been held not maintainable; L. R., 1 Q. B. 609, 610, 617; see also *Youngmann v. Briesmann*, W. N. 1892, 162, M. Sit. C. A., and *Mulliner v. Florence*, 3 Q. B. D. 484, 493, *per* Brett, L.J. Where the defendant has a lien on goods, he is guilty of conversion, if, instead of retaining them, he sell or enable some other person to sell them. S. C.; *Clarke v. Gilbert*, 2 N. C. 357. See as to sale of shares mortgaged, otherwise than by deed, *Deverges v. Sandeman*, (1902) 1 Ch. 579, C. A.

Where the defendant took the plaintiff's boat in order to reach his own vessel which was on fire, while under the plaintiff's care, and the boat was accidentally sunk, Ld. Ellenborough was of opinion that this was not a conversion. *Drake v. Shorter*, 4 Esp. 165. So, it is no conversion if the master of a ship throws goods into the sea to prevent the ship from sinking. *Bird v. Astock*, 2 Bulstr. 280. Where the defendant has done the act complained of by the licence of the plaintiff it is no conversion. Thus, if a person, against whom a commission of bankrupt had issued, acquiesced in it so far as to take a part in the sale of his own goods, by recommending an auctioneer to conduct the sale, it was held to be no conversion. *Clarke v. Clarke*, 6 Esp. 61.

Though the burning or destroying of property by the defendant is a conversion, if done with intent to destroy or appropriate (*vide ante*, pp. 968, 971), it is no conversion if the goods be burnt by accident, or even by the mere negligence of the bailee, or by the act or negligence of a third person not in privity with the bailee. It is otherwise if destroyed while in the *wrongful* possession of the defendant, though not with his privity; or, if they are damaged while he is exercising a dominion over them, inconsistent with the

rights of the real owner. *Heald v. Carey*, 11 C. B. 977; 21 L. J., C. P. 97. It is no conversion for the defendant to cut away timber improperly fixed or bedded by the plaintiff in the defendant's close, so as not to be easily removable. *Simmons v. Lillystone*, 8 Exch. 431; 22 L. J., Ex. 217.

Evidence of conversion—demand and refusal.] A demand of the goods by the plaintiff, and a refusal to deliver them by the defendant, he having the power to deliver them, are evidence of a conversion; but being only presumptive evidence of a conversion, it may be rebutted by evidence to the contrary. 2 Wms. Saund. 47 i, (1). A demand and refusal are evidence of a *prior* conversion. *Per Cur.* in *Wilton v. Girdlestone*, 5 B. & A. 847. A refusal must be proved; mere excuses for not delivering the goods will not be sufficient. *Severin v. Keppell*, 4 Esp. 156; *Addison v. Round*, 7 C. & P. 285. But the refusal need not be express; thus where, in trover by assignees of a bankrupt for a landau, it appeared that, after the act of bankruptcy, the bankrupt had sold the landau to the defendant, and that a written demand of it had been left by the plaintiff at the defendant's house; but it did not appear that the latter had expressly refused to deliver it up, Richardson, J., ruled that the demand, and the non-delivery in pursuance of the demand, were evidence of a conversion. *Watkins v. Woolley*, Gow, 69. The fact that the plaintiff's goods are in the defendant's house from which he has ejected the plaintiff, is not necessarily proof of a conversion; a demand and refusal should be proved. *Thorogood v. Robinson*, 6 Q. B. 769. See *Wilde v. Waters*, 16 C. B. 637; 24 L. J., C. P. 193. Where the defendant, being applied to by the holder, A., for a blank acceptance, which had been returned by A. to the acceptor, for correction, replies that he cannot return it "because it is burnt": this answer, coupled with the fact that the defendant is *not* called as a witness for the defence, is evidence of a possession and destruction by him. *McKewen v. Cotching*, 27 L. J., Ex. 41.

There are many cases in which a refusal to deliver goods will not be evidence of a conversion. In order to render a demand and refusal evidence of conversion, it must appear that, at the time of the demand made, the party had it in his power to deliver up or retain the article demanded. *Smith v. Young*, 1 Camp. 441. As where one B. had hired a chaise for the plaintiff, and placed it at livery with the defendant, in whose possession it was attached by process out of the sheriff's court in an action against B., and the plaintiff demanded the chaise, which the defendant refused to deliver, alleging that it had been attached: it was held that this was no evidence of a conversion, the chaise being at the time of the demand in the custody of the law. *Verrall v. Robinson*, 2 C. M. & R. 495. In *Pillott v. Wilkinson*, 3 H. & C. 345; 34 L. J., Ex. 22, Ex. Ch., the plaintiff had purchased and received a warrant for wine deposited with the defendant, a wharfinger; the plaintiff presented his warrant, which was indorsed generally by H. & Co., and demanded the wine; the warehouseman of the defendant said that the goods had been stopped by an attachment from the mayor's court; defendant could not be found, but it appeared that he had been served a few days previously with notice of attachment on all the goods of H. & Co.; the same day the plaintiff wrote demanding the wine, and requiring an answer by 11 A.M. next day; the defendant wrote next day in reply, asking for time, but before his letter was received the plaintiff had issued a writ: it was held that there was evidence for the jury of a conversion. If a person, who finds goods, refuse to deliver them to the owner until he proves his right to them, such refusal is not necessarily evidence of conversion. *Green v. Dunn*, 3 Camp. 215, n.; *Guntton v. Nurse*, 2 B. & B. 447; *Clark v. Chamberlain*, 2 M. & W. 78. The proper question to be left to the jury seems to be, whether the defendant

had a *bonâ fide* doubt as to the title to the goods, and if so whether a reasonable time for clearing up that doubt had elapsed. See *Burroughes v. Bayne*, 5 H. & N. 296, 308; 29 L. J., Ex. 185, 191, *per* Bramwell, B. Where goods, the property of the plaintiff, had been, by the servants of an insurance company, carried to a warehouse of which the defendant, a servant of the company, kept the key; and the defendant, on being applied to by the plaintiff, to deliver them up, refused to do so without an order from the company, it was held that this refusal was no evidence of a conversion. *Alexander v. Southey*, 5 B. & A. 347. A dishonoured bill was demanded of the defendant, who did not deny the plaintiff's right to it, but said it was in the hands of his attorney, A. B., and that he would get it from him, if the plaintiff would call again; on calling again the defendant had not got it back from A. B.: it was held that, if the defendant did not really mean to withhold the bill, this did not prove a conversion. *Towne v. Lewis*, 7 C. B. 608.

But, a refusal on the ground of a claim of right by another is evidence of a conversion. *Caunce v. Spanton*, 7 M. & Gr. 903; and see *Wansbrough v. Maton*, 4 Ad. & E. 884. So is a refusal to give up to the plaintiff his title deeds, except on payment of charges for which he is not liable. *Davies v. Vernon*, 6 Q. B. 443. Where the widow and administratrix of an insolvent, being applied to by his assignees for papers in his possession at his death, answered that they were in the hands of her attorney, it was held that this was not sufficient evidence of a conversion. *Canot v. Hughes*, 2 N. C. 448. But, where a person who claimed to have a lien upon goods, delivered them to a bailee, and the real owner demanded them of the latter, who refused to deliver them without the directions of the bailor, it was held that, the bailor not having any lien upon the goods, the refusal by the bailee was evidence of a conversion; and *per* Ld. Tenterden, C.J., "A bailee can never be in a better situation than the bailor. If the bailor has no title, the bailee can have none, for the bailor can give no better title than he has. The right to the property may, therefore, be tried in an action against the bailee." *Wilson v. Auderton*, 1 B. & Ad. 450, 456; *Lee v. Robinson*, 25 L. J., C. P. 249, cited *post*, p. 978; *Cheesman v. Exall*, 6 Exch. 341. So, in trover against a carrier, by the bailor of the goods, he may set up the right of the real owner, who has claimed and received them from the carrier. *Sheridan v. New Quay Co.*, 4 C. B., N. S. 618; 28 L. J., C. P. 58. A refusal by the general agent of a party is not evidence of a conversion by that party; it must be shown that, in the particular act of refusal, the agent acted under the special directions of his principal. *Per* Gibbs, C.J., *Pothonier v. Dawson*, Holt, N. P. 383. But proof of a refusal by the shop servant of a pawnbroker has been held to be evidence of a conversion by the master. *Jones v. Hart*, 2 Salk. 441. And, where a bailiff wrongfully took the goods of the plaintiff, and lodged them on the defendant's premises, and the defendant's wife, in his absence, refused to deliver them up to the plaintiff, this was held evidence of a conversion by the wife. *Catterall v. Kenyon*, 3 Q. B. 310. A demand to re-deliver a chattel injured by the defendant "in the same plight as when it came to the defendant's possession," followed by a refusal, is not evidence of a conversion. *Rushworth v. Taylor*, 3 Q. B. 699.

A demand of the value of the goods has been held a sufficient demand of the goods. *Thompson v. Shirley*, 1 Esp. 31. And, service of a written demand, by leaving it at the house of the defendant, is good. *Logan v. Houlditch*, 1 Esp. 22. Where two independent contemporary demands have been made, one oral and the other in writing, proof of either will be sufficient. *Smith v. Young*, 1 Camp. 440. A demand and refusal of "fixtures" is no evidence of the conversion of articles which are not fixtures. *Colegrave v. Dias Santos*, 2 B. & C. 76.

The trustee of a bankrupt cannot recover, in trover, goods delivered by the

bankrupt before his bankruptcy, by way of a fraudulent preference, without proof of a demand and refusal, unless the preference is itself an act of bankruptcy to which the bankruptcy has relation. *Stevenson v. Newnham*, 13 C. B. 285; 22 L. J., C. P. 110, Ex. Ch.; *Nixon v. Jenkins*, 2 H. Bl. 135.

If the defendant refuse to deliver goods, alleging an insufficient ground of refusal, whereupon the plaintiff brings trover, it has been questioned whether the defendant can set up at the trial another and different ground. *Coles v. Bank of England*, 10 Ad. & E. 444, 445, *per* Patteson, J.

The delivery of a ship by the defendant to the plaintiff, the mortgagee, in pursuance with a demand made by him, is sufficient, although the ship is then liable to be seized by process of law, by reason of the defendant's default in paying the wages of the crew. *Johnson v. R. Mail S. Packet Co.*, L. R., 3 C. P. 38.

Evidence of conversion—by whom.] The action may be brought against any person who was a party to the conversion, although the goods were actually converted by another. 2 Wms. Saund. 47 x, (1). Thus, if a party sue out an execution against a bankrupt, and the sheriff seize the goods and sell them, and give the money to the creditor, the trustee may bring trover against the sheriff, or against the party suing out execution, if he can be proved to be a party to the conversion, by giving a bond to secure the sheriff, and so making the seizure his own act. *Rush v. Baker*, B. N. P. 41. But, where the wrongful seizure is made without the privity of the execution creditor, a subsequent ratification by him will not render him liable; *Wilson v. Tuman*, 6 M. & Gr. 236; *acc. Keighley, Marsted & Co. v. Durant*, (1901) A. C. 240, D. P. cited *ante*, p. 312; though it was formerly held that the execution creditor was liable in trover if he had received the proceeds of the levy. *Rush v. Baker*, *supra*; Str. 996; 2 Wms. Saund. 47 x, (1). Where a bankrupt left some plate with his wife, who delivered it to a servant to sell, and the servant delivered it at the door of W.'s shop to the defendant, who went into the shop and pawned it to W. in his own name, and delivered the money to his wife, it was held to be a conversion by the defendant. *Parker v. Godin*, Str. 813; B. N. P. 47.

Trover will lie against a corporation, and it is not necessary to show that the conversion was authorized by an instrument under seal. *Farborough v. Bank of England*, 16 East, 6; *Duncan v. Surrey Canal Co.*, 3 Stark. 50. And a corporation is liable for acts done by its agent in the course of his ordinary duty, as in distraining for dues, &c. *Smith v. Birmingham Gas Co.*, 1 Ad. & E. 526. Agency may be inferred from the subsequent adoption of the act by the corporation. S. C. Where the conversion is by a contractor for works on a railway, this is not evidence of a conversion by the company. *Glover v. L. & N. W. Ry. Co.*, 5 Exch. 66. See further, *ante*, pp. 69 *et seq.*, and Part III., *sub tit. Actions against companies—Torts by corporations*, *post*, pp. 1094 *et seq.*

A servant is liable in an action in trover for a conversion, though for his master's benefit. *Stephens v. Elwall*, 4 M. & S. 259; *Alexander v. Southey*, 5 B. & A. 249; *Perkins v. Smith*, *ante*, p. 972. See also *McEntire v. Potter*, 22 Q. B. D. 438. So, a clerk who refuses to re-deliver a bill of exchange wrongfully indorsed to him, which he has carried to his master's account. *Cranch v. White*, 1 N. C. 414; 1 Scott, 314. See *Symonds v. Atkinson*, 1 H. & N. 146; 25 L. J., Ex. 313. But, a servant or agent, who has received goods from his master or principal, may, on a demand made by the true owner of the goods, give a qualified refusal to deliver them up, without being liable to an action of trover; as if the ostler at a stable states his unwillingness to give up a horse claimed by a stranger, until his master had been

spoken to about it; but where a bailee sets up or relies upon the title of his bailor in answer to such demand, his refusal is evidence of a conversion by him. *Lee v. Robinson*, 25 L. J., C. P. 249.

A packer who in the course of his business shipped goods under the orders of a person who employed him for that purpose, was held not guilty of a conversion, although the goods were wrongfully delivered to him. *Greenway v. Fisher*, 1 C. & P. 190, 192. In this case, Abbott, C.J., says, "The distinction between this case and that of a servant is, that here there is a public employment; and as to a carrier, if while he has the goods, there be a demand and refusal, trover will lie, but while he is a mere conduit-pipe in the ordinary course of trade, I think he is not liable." *Accord.* — (*Assignees*) *v. S. E. Ry. Co.*, Ex., cited *per* Willes, J., 18 C. B. 609. This principle no doubt applies in the case of a carrier, as he is bound to carry goods tendered to him; but it has been denied to apply in any case in which the person receiving the goods is not so bound, as in the case of a packer above mentioned. *Fowler v. Hollins*, L. R., 7 Q. B. 616, 633, Ex. Ch., *per* Martin, B. See, however, S. C., L. R., 7 H. L. 799, *per* Ld. O'Hagan. Where cotton was fraudulently bought by B. of the plaintiff's brokers, and the defendants, who were also brokers, bought it of B. in their own name as principals *bonâ fide*, and at once sampled it; the defendants resold the cotton in the ordinary course of trade to M. at the same price, *plus* a commission, fetched it away in their cart, and forwarded it to M., who paid for it to the defendants, and spun it into yarn; this was held to amount to a conversion of the cotton by the defendants. S. C., L. R., 7 H. L. 757.

An auctioneer, A., who in the ordinary course of his business sells and delivers to the purchasers goods entrusted to him for that purpose by a person in possession of them, P., without notice that P. is not the true owner, O., is liable to O. for conversion, whether the sale be on the premises of P.; *Consolidated Bank v. Curtis*, (1892) 1 Q. B. 495; or of A.; *Cochrane v. Rymill*, 40 L. T. 744, E. S. 1879, C. A.; *Barker v. Furlong*, (1891) 2 Ch. 172. Where, however, the sale was, before the auction, effected by P. himself on A.'s premises, A. was held not liable, although he gave, by P.'s request, a delivery order to the buyer, who removed the goods. *National Mercantile Bank v. Rymill*, 44 L. T. 767; T. S. 1881, C. A.

Where the master of a ship, unjustifiably, but in the *bonâ fide* exercise of his discretion, sold a cargo at a port short of its destination, and the shipowner adopted the sale and paid over the proceeds to the owner of the cargo; it was held that trover lay against the master and shipowner jointly, and that it was not necessary in such action to produce the charter-party, the bill of lading showing on the face of it the contract of carriage. *Ewbank v. Nutting*, 7 C. B. 797. As to the right of the master of a ship to sell the cargo in case of necessity, see *Australasian Steam Nav. Co. v. Morse*, L. R., 4 C. P. 222. In *Hilbery v. Hatton*, 2 H. & C. 822; 33 L. J., Ex. 190, a ship grounded on the coast of Africa was wrongfully bought for the defendants by their agent there, without authority; in answer to the agent's letter informing them of the purchase, the defendants wrote, "You do not say from whom you bought her, nor whether you have the register with her. *You had better, for the present, make a hulk of her*": it was then held that there was evidence for the jury of a conversion by authority of the defendants.

Evidence of conversion—tenant in common, &c.] As the possession of one joint-tenant, tenant in common, or parcener, is the possession of the others, trover cannot in general be maintained by one joint-tenant, &c., against his companion. Co. Litt. 200 a; 2 Wms. Saund. 47 o, (1); *Jacobs v. Seward*, L. R., 5 H. L. 464. The removal of entire chattels by one tenant in common, without the consent or knowledge of the other, for the purpose of

selling them, and applying the proceeds to his own use, does not amount to a conversion, even although the removal has created a lien on the chattels by a third party. *Jones v. Brown*, 25 L. J., Ex. 345. Where the plaintiff and one of the defendants were members of a friendly society, the funds of which were kept in a box deposited with them, and the defendant took away the box, and delivered it to the other defendant, who was not a member of the society, it was held that the plaintiff could not maintain trover for the box. *Holliday v. Camsell*, 1 T. R. 658. So, where one tenant in common of a whale refused to deliver a moiety of it to the other, and cut it up and expressed the oil, it was held that this was no conversion. *Fennings v. Grenville, Ltd.*, 1 Taunt. 241. But if one tenant in common, &c., destroy the thing in common, trover lies. See *Jacobs v. Seward*, *ante*, p. 978. Thus, where one tenant in common of a ship took it away by force, and sent and sold it in the West Indies, where it was lost in a storm, it was held to be evidence of a destruction by him. *Barnardiston v. Chapman*, cited 4 East, 121; B. N. P. 34. So, it has been said that the sale of the whole of a chattel by one tenant in common, without authority of his co-tenant either express or implied, is, with respect to the other, a wrongful conversion of his undivided part. *Per Bayley, J.*, *Barton v. Williams*, 5 B. & A. 403; *Heath v. Hubbard*, 4 East, 110, 126. However, it is now settled that a mere sale of an entire chattel by a co-tenant, so as not wholly to deprive the plaintiff of his power of re-possession is not a conversion, for it only operates upon the undivided share of the vendee, unless it be a sale in the market overt so as to change the property of the whole. *Mayhew v. Herrick*, 7 C. B. 229; *Harper v. Godsell*, L. R., 5 Q. B. 422.

Damages.] In actions for conversions, the general rule is, that the damages should be the value of the thing converted. *Finch v. Blount*, 7 C. & P. 478. A *bonâ fide* sale to a solvent customer is evidence of value on which a jury are bound to act. *France v. Gaudet*, L. R., 6 Q. B. 199, 204. Where the plaintiff's negotiable securities had been wrongfully deposited by A. with the defendant, and had been sold by him, the plaintiff was held entitled to recover the proceeds of the sale and 4 per cent. interest. *Simmons v. L. Joint Stock Bank*, and *Little v. Id.*, (1891) 1 Ch. 270. Where the defendant wrongfully detained from the plaintiff a bill for 1600*l.*, and got 800*l.* upon it, it was held that the plaintiff was entitled to the full amount as damages. *Alsager v. Close*, 10 M. & W. 576. See *Bavins v. L. & S. W. Bank*, (1900) 1 Q. B. 270, C. A. Where the defendant did not give up the plaintiff's goods on demand, in order that he might seize and sell them under a County Court judgment, which he did; the plaintiff was held entitled to recover the full value of the goods. *Edmondson v. Nuttall*, 17 C. B., N. S. 280; 34 L. J., C. P. 102. So, the plaintiff may recover the full value, although he has only a special property in the goods. *Swire v. Leach*, 18 C. B., N. S. 479; 34 L. J., C. P. 150; *accord. The Winkfield*, (1902) P. 42, 57, C. A., cited *ante*, p. 782. But there are some circumstances which may operate in mitigation of damages. Where an unpaid vendor sold goods, the property in which had been transferred to the vendee, it was held that the vendee could recover only the difference between the price agreed on and the value of the goods. *Chinery v. Viall*, 5 H. & N. 288; 29 L. J. Ex. 180. Where the pledgee of a dock warrant had converted it before the day fixed for the payment of the money advanced, it was held that the interest of the defendant in the pledge must be taken into account in measuring the damage which the plaintiff had sustained. *Johnson v. Stear*, 15 C. B., N. S. 330; 33 L. J., C. P. 130; *accord.*, *Donald v. Suckling*, L. R., 1 Q. B. 585, and *Halliday v. Holgate*, L. R., 3 Ex. 299, Ex. Ch. The damages recoverable from a stranger, who converted the goods, would, however, be their full value. *Johnson v.*

Lancashire & Yorkshire Ry. Co., 3 C. P. D. 499. See also, *Brierly v. Kendall*, *Toms v. Wilson*, and *Massey v. Staden*, cited *ante*, p. 927.

In trover for a guarantee the plaintiff is entitled to the sum recoverable on it by him, though mutilated by the defendant. *M'Leod v. M'Ghie*, 2 M. & Gr. 326. Where the executor of A. received money on a policy on the life of A., which A. had conveyed to B. in trust for creditors, B. may recover the money from the executor in trover for the policy. *Watson v. McLean*, E. B. & E. 75. In trover for title deeds, the jury may give the full value of the estate to which they belong by way of damages, although they are generally reduced to 40s. on the deeds being given up. *Loosemore v. Radford*, 9 M. & W. 657, *per* Alderson, B. Where the defendant, a sheriff, who held goods taken in execution, delivered them to the plaintiffs, assignees of a bankrupt, after trover brought against him by the plaintiffs, and the plaintiffs accepted them without condition, it was held that they could not recover more than nominal damages; at all events not without alleging special damage. *Moon v. Raphael*, 2 N. C. 310. So where the goods have been dealt with in such a manner as is equivalent to a return, the plaintiff can only recover the actual damage he has sustained. *Hiorst v. L. & N. W. Ry. Co.*, 4 Ex. D. 188, C. A.

In trover for coals, the action was brought to try the right to the mines, which had been worked by the defendant, and turned on the effect of an old conveyance; Parke, B., directed the jury that if there was fraud or negligence in the defendant, they might give the full value of the coal, without deduction of expenses, &c.; but if he acted honestly, in the belief that he was entitled to the mines, the proper damages would be the value as if the coalfield had been bought by the defendant from the plaintiff; the jury thereupon gave, for damages, a certain sum per acre on the latter estimate, and the direction was acquiesced in. *Wood v. Morewood*, 3 Q. B. 440 n.; see further the cases cited *ante*, p. 939. So where a lease has been surrendered by the tenant, after a distress, with notice to the landlord A. that the growing crops have been assigned to B., A. is entitled as against B., to the rent and expenses of cultivating and harvesting the crops. *Clements v. Matthews*, 11 Q. B. D. 808, C. A. In trover for a cargo, improperly sold by the master of a ship, before arrival at the port of destination, the jury are justified in giving as damages the cost price and amount of freight paid; and this, it seems, is the *least* that ought to be given, when there is no proof *contra*, by the defendants. *Eubank v. Nutting*, 7 C. B. 797. Where the defendants converted a vessel before she was finished, and then finished her, it was held that the plaintiffs were entitled to recover, as damages in trover, the value of the vessel at the time of the conversion, but not her value at a subsequent time, nor, as special damage, the value of freight which the plaintiffs might have earned with her if she had been completed by the person who had contracted to build the same for the plaintiffs, and delivered to them. *Read v. Fairbanks*, 13 C. B. 692. See also *Dreyfus v. Peruvian Guano Co.*, in D. P., (1892) A. C. 166, and S. C. *Id.* 170. In trover by trustee of a bankrupt, against a creditor of the bankrupt for a wrongful seizure and sale under a *fi. fa.*, the jury are not bound to give the value of the goods if the sale was *bona fide*, but may give the amount of the sale only; for the goods must be sold at all events, either by the plaintiff or the defendant. *Whitmore v. Black*, 13 M. & W. 507. In trover for fixtures which have been severed by the defendant, their value only, as so severed, is recoverable. *McGregor v. High*, 21 L. T. 803, Keating, J. Special damage over and above the value of the goods is recoverable in this action if laid in the statement of claim; *Bodley v. Reynolds*, 8 Q. B. 779; *Wood v. Bell*, 5 E. & B. 772; 6 E. & B. 355; 25 L. J., Q. B. 148, 321; *contra*, *Balme v. Hutton*, 9 Bing. 477; Ex. Ch. *per Cur.*; when, however, they are not so laid they are not recoverable.

Davis v. Oswell, 7 C. & P. 804. See further *France v. Gaudet*, L. R., 6 Q. B. 199, 205.

By 3 & 4 W. 4, c. 42, s. 29, cited *ante*, p. 625, the jury may, in this action, give damages in the nature of interest, over and above the value of the goods.

Defence.

By Rules, 1883, O. xix. r. 17, a defendant cannot now plead a general denial of the allegations in the statement of claim, and r. 15 requires him to state all such facts, on which he relies, as do not appear therein, and if not stated would be likely to take the plaintiff by surprise. *Vide ante*, p. 309.

If the defendant deny the plaintiff's right to possession of the goods, and it be found that some of the goods belonged to the plaintiff, and some to the defendant, the issue is divisible, and the verdict should be entered distributively. *Williams v. Gl. W. Ry. Co.*, 8 M. & W. 856; *Freshney v. Wells*, 26 L. J., Ex. 228. Where goods were deposited with B. by their owner A. to A.'s order, and A. subsequently transferred his property in them to C., it is no defence to an action by C. against B. for their value, that B. had wrongfully delivered them to D. before C. acquired his title. *Bristol, &c., Bank v. Midland Ry. Co.*, (1891) 2 Q. B. 652. C. A.

It seems that the fact that the plaintiff's case is founded on an unprosecuted felony affords no defence. *Wells v. Abchurchs*, L. R., 7 Q. B. 554. See further hereon other cases cited *ante*, p. 961.

Jus tertii.]—The defendant, when he is not a bailee or agent, may set up the title of a third person though he does not claim under that person. *Leake v. Loveday*, 4 M. & Gr. 972. And an agent may set up a *jus tertii*, where the bailment has been determined by what is equivalent to an eviction by title paramount. The plaintiff, who had wrongfully distrained the goods of R., delivered them to the defendant, an auctioneer, for sale; R. served a notice on the defendant that the distress was void, and required him to retain the proceeds of the sale on his (R.'s) behalf; it was held that the defendant was justified in retaining the proceeds. *Biddle v. Bond*, 6 B. & S. 225; 34 L. J., Q. B. 137. See on this case *Henderson v. Williams*, (1895) 1 Q. B. 521, C. A. See further *Leake v. Loveday*, *supra*; *Thorne v. Tilbury*, 3 H. & N. 534; 27 L. J., Ex. 407. A bailee cannot, however, set up the title of another, unless he defends upon M.'s right and title and by his authority. *Rogers v. Lambert*, 24 Q. B. D. 573; S. C., (1891) 1 Q. B. 318, C. A. So M.'s title cannot be set up where M. has abandoned his right. *Betteley v. Reed*, 4 Q. B. 511. And where a bailee accepts the bailment, with notice of an adverse claim, he cannot afterwards set up the existence of that claim, as against his bailor. *Ex pte. Davies*, 19 Ch. D. 86, C. A. In trover by the trustee of a bankrupt to recover the value of property assigned to the defendant by way of fraudulent preference, the defendant cannot set up the title of the trustee under a prior bankruptcy, that trustee not having in any way interfered with the property or asserted his title to it. *Morgan v. Knight*, 15 C. B., N. S. 669; 33 L. J., C. P. 168. See cases collected in judgment in this case. See also *Nicholson v. Cooper*, 3 H. & N. 384; 27 L. J., Ex. 393; *Barker v. Furlong*, (1891) 2 Ch. 172. So a mere wrongdoer cannot set up a *jus tertii*. *Jeffries v. Gl. W. Ry. Co.*, 5 E. & B. 802; 25 L. J., Q. B. 107. See also *The Winkfield*, (1902) P. 42, 55, cited *ante*, p. 782.

Evidence of general lien.] A lien on the goods, either general or particular (*i.e.*, in respect of a general balance or of the particular goods), and a right to the possession of them, until the claim is satisfied, is a defence in this action. It must be pleaded specially. *Vide supra*.

A general lien may be proved, either by evidence of an express agreement, or of the mode of dealing between the parties, or of the general usage of other persons engaged in the same employment, of such notoriety as that it may fairly be presumed to be known to the owner of the goods. *Rushforth v. Hadfield*, 7 East, 228; *Green v. Farmer*, 4 Burr. 2220; *Cumpston v. Haigh*, 2 N. C. 449; *Plaive v. Allcock*, 4 F. & F. 1074. To establish a general lien by evidence of the general usage, the instances ought to be ancient, numerous, and important. *Rushforth v. Hadfield*, 6 East, 526. Where a number of tradesmen come to an agreement not to receive the goods of any person, who will not consent that the goods shall be retained for a general balance, and a party, having notice of such agreement, sends his goods, without objection, he will be bound by it. *Kirkman v. Shawcross*, 6 T. R. 14. So, if a carrier give notice that all goods shall be considered subject to a lien, not only for the freight of the particular goods, but also for any general balance due from the respective owners, as between the real owner of the goods, and the carrier, this may be a binding bargain. But, in such a case the carrier has not, as against the real owner, any lien for the balance due to him from the party to whom the goods are addressed, being the mere factor of the owner. *Per Bayley, J., Wright v. Snell*, 5 B. & A. 353. In order that a right of general lien may attach to goods, a new act must be done, viz., the delivery of goods by the same party to the carrier. *Wiltshire Iron Co. v. Gt. W. Ry. Co.*, L. R., 6 Q. B. 776, 777, Ex. Ch. A contract to carry a given number of articles at a lump sum, and any further number of articles, if any, at so much each, is divisible, and the lien for the excess does not attach to the whole. *Prently v. Midland Gt. W. Ry. Co.*, 14 W. R. 314; Ir. Ex. 1866. A usage for carriers to retain goods, as a lien for a general balance of accounts between them and their consignees, cannot affect the right of the consignor to stop the goods *in transitu*, *vide post*, p. 988. *Oppenheim v. Russell*, 3 B. & P. 42. So, also a carrier, who, by the usage of a particular trade, is to be paid for the carriage of goods by the consignor, has no right to retain them, against the consignee, for a general balance due to him, for the carriage of other goods of the same sort sent by the consignor. *Butler v. Woolcott*, 2 N. R. 64. The lien of wharfingers for their general balance has been proved so often that it is to be considered a settled point; *per* Id. Kenyon, *Naylor v. Mangles*, 1 Esp. 110; *Spears v. Hartly*, 3 Esp. 81. So, of calico printers, *Weldon v. Gould*, Id. 268. So, the lien of a banker for his general balance upon the securities of his customers in his hands. *Jourdain v. Lefevre*, 1 Esp. 66; *Bolland v. Bygrave*, Ry. & M. 271; *Brandão v. Barnett*, 3 C. B. 519, D. P.; *Misa v. Currie*, 1 Ap. Ca. 554, D. P. It seems that the term "securities" includes bills of exchange, promissory notes, exchequer bills, coupons and bonds of foreign governments, &c., but not title deeds. See *Wylde v. Radford*, 33 L. J., Ch. 51, 53. The lien does not extend to securities contained in boxes which have been deposited with the banker for safe custody only, and to which he has not access. *Leese v. Martin*, L. R., 17 Eq. 224. And the circumstances of the deposit of the securities may prevent the lien from arising. *Brandão v. Barnett*, *supra*. See also *Bock v. Gorrisen*, 2 D. F. & J. 434; 29 L. J., Ch. 673. Stock brokers have a general lien on securities in their hands. *Jones v. Peppercorne*, Joh. 430; 28 L. J., Ch. 158; *In re L. & Globe Finance Cor.*, (1902) 2 Ch. 416. A printer employed to print certain numbers, not consecutive, of an entire work, has a lien upon the copies not delivered, for his general balance for the whole of those numbers. *Blake v. Nicholson*, 3 M. & S. 167. With regard to dyers, a lien for their general balance has been recognised in several cases. *Savill v. Barchard*, 4 Esp. 53; *Humphreys v. Partridge*, Gloucester Sum. Ass. 1803, *cor.* Lawrence, J., cited Montagu's

Law of Lien, 30, n.; *Anon.*, cited 8 Taunt. 499, 509, *per* Gibbs, C.J. See also 5 Taunt. 60. But in other cases, in which such a lien was claimed, the evidence was held insufficient to establish it. *Green v. Farmer*, 4 Burr. 2214; *Close v. Waterhouse*, 6 East, 523, n. See the old cases collected in Montagu's Law of Lien, 28, 29. In *Plaice v. Allcock*, *ante*, p. 982, a lien was proved in the Nottingham bleaching trade. So in Bristol, in the case of wine merchants, who are warehousemen, or bonded cellar keepers. *Ex pte. Ludlow*, W. N., 1879, p. 65, Bky. Solicitors have a lien for their general balance on papers of their clients, which come to their hands in the course of their business; *Stevenson v. Blakelock*, 1 M. & S. 535; but the lien does not extend to a debt due from the client to the solicitor otherwise than under his retainer. *In re Gallard*, 31 Ch. D. 296, C. A. Insurance brokers have a lien for their general balance even against agents, if they do not disclose their principals. *Mann v. Forrester*, 4 Camp. 60. See further *Fisher v. Smith*, 4 Ap. Ca. 1, D. P., cited *post*, p. 984. But not where they have notice that the party who employs them is merely an agent. *Maunss v. Henderson*, 1 East, 335; *Mildred v. Maspons*, 8 Ap. Ca. 874, D. P. Stat. 6 E. 7. c. 41, s. 53 (2), *ante*, p. 421, is to the same effect. Factors have a general lien; *Kruger v. Wilcox*, Ambler, 252; even although the principal fixes the price, and they sell in his name; *Stevens v. Biller*, 25 Ch. D. 31, C. A.; but the lien extends only upon goods which come to their hands as factors. *Dixon v. Stansfield*, 10 C. B. 399. So packers, who are in the nature of factors, have a general lien. *Green v. Farmer*, 4 Burr. 2222; *Savill v. Barchard*, 4 Esp. 55; *accord. Ex pte. Shubbrook*, 2 Ch. D. 489. The lien of factors or agents is now regulated by the Factors Act, 1889 (52 & 53 V. c. 45). See *ante*, pp. 956 *et seq.*, and 1 Smith's L. C. 11th ed. 763.

An innkeeper, or keeper of a house providing general accommodation for wayfarers, whatever may be its name, has a general lien on the goods of his guests. *Thompson v. Lacy*, 3 B. & A. 283; *Mulliner v. Florence*, 3 Q. B. D. 484, C. A. But an innkeeper cannot detain the person of his guest, or take off his guest's clothes, in order to secure the payment of his bill. *Sunbolf v. Alford*, 3 M. & W. 248. An innkeeper's lien extends to goods brought to his inn by a guest, though they belong to a third party, provided they are such as a person might ordinarily be expected to travel with. *Snead v. Watkins*, 1 C. B., N. S. 267; 26 L. J., C. P. 57; *Turrill v. Crawley*, 13 Q. B. 197; or articles which the innkeeper has received as the guest's luggage; *Threfall v. Borwick*, L. R., 7 Q. B. 711; L. R., 10 Q. B. 210, Ex. Ch.; even though the innkeeper knew they were not the property of his guest. *Robins v. Gray*, (1895) 2 Q. B. 78, 501, C. A. It seems that the innkeeper has a lien on whatever goods he would be liable to answer for, in the case of loss. S. C., *per Cur.* Where S. and his wife, L., stayed together at an hotel, credit being given to S., the lien was held to attach to luggage which was L.'s separate property. *Gordon v. Silber*, 25 Q. B. D. 491. It extends even to goods fraudulently obtained from the plaintiff, a third party, by the guest. *Mulliner v. Florence*, 3 Q. B. D. 484, C. A. Where B. lent a pianoforte to a professional artist whilst staying as a guest at an inn, the innkeeper knowing that the pianoforte was the property of B.: held, that the innkeeper had no lien on the pianoforte for the bill due from the guest, as he had not received it as his guest's luggage. *Broadwood v. Granara*, 10 Exch. 417. If the innkeeper sold the goods he lost his lien, and the owner might have recovered the full value. *Mulliner v. Florence*, *supra*. Now, however, by the Innkeepers Act, 1878 (41 & 42 V. c. 38), an innkeeper may after the lapse of 6 weeks sell the goods and thereout satisfy his lien, and hand over the overplus to the owner of the goods: provided that, at least one month before such sale, an advertisement be inserted in a London and a country newspaper circulating in the district where the goods were left, containing a notice of the intended sale, with a

description of the goods, and the name of the owner. As to the lien of an innkeeper on the horses of his guest, see *Mulliner v. Florence*, ante, p. 983; *Smith v. Dearlove*, and *Allen v. Smith*, post, p. 985.

"Where a general usage has been judicially ascertained and established, as in the case of the banker's lien above mentioned, it becomes part of the law merchant, and is judicially noticed by the courts." *Brandão v. Barnett*, 3 C. B. 519, 530, D. P. See further, ante, p. 83.

The English consignee of a West India plantation has a lien on the plantation in respect of the balance due to him from the proprietor. *Chambers v. Davidson*, L. R., 1 P. C. 296, 305.

The Railway Clauses Consolidation Act, 1845, s. 97, which gives those railway companies to which the Act applies a general power of sale over the property of a customer in their possession, for arrears of tolls for the use of their line by the running by him of his own waggons, &c., thereon, has been held not to apply to sums due for the carriage of goods by the company as carriers. *Wallis v. L. & S. W. Ry. Co.*, L. R., 5 Ex. 62; not followed by *Ld. Shand in Caledonian Ry. Co. v. Guild*, 1 Rettie, 198; see however *Brown v. Gt. W. Ry. Co.*, 9 Q. B. D. 744, C. A., decided on sect. 95. See further on sect. 97, *N. Central Wagon Co. v. Manchester, &c., Ry. Co.*, 35 Ch. D. 191, C. A.; 13 Ap. Ca. 554, D. P. A demand by the company of the sum due for tolls is necessary before selling under that section. *Field v. Newport, &c., Ry. Co.*, 3 H. & N. 409; 27 L. J., Ex. 396.

The solicitor to an official liquidator of a company being wound up has no lien for his costs on the file of proceedings in the winding up and the documents relating thereto. *Ex pte. Pulbrook*, L. R., 4 Ch. 627. And by Bky. R. 1886, r. 349, "no person shall, as against the official receiver or trustee, be entitled to withhold possession of the books of accounts belonging to the debtor, or to set up any lien thereon."

As to lien of a company on its shares conferred by its articles of association, vide post, p. 1099.

Evidence of a particular lien.] In general, where a person bestows his labour on a particular chattel, delivered to him in the course of his business, he has a lien upon such chattel for the amount of his charge. See *Bleaden v. Hancock*, 4 C. & P. 152; *Steadman v. Hockley*, 15 M. & W. 553. Thus, a miller has a lien on the corn ground by him; *Ex pte. Ockenden*, 1 Atk. 235; *Chase v. Westmore*, 5 M. & S. 180; a shipwright on a ship for repairs; *Franklin v. Hosier*, 4 B. & A. 341; *Ex pte. Willoughby*, 16 Ch. D. 604; a tailor on the cloth delivered to and made up by him. *Hussey v. Christie*, 9 East, 433; *Blake v. Nicholson*, 3 M. & S. 169. Insurance brokers have a particular lien for premiums on policies effected by them, even against agents who disclose their principals. *Fisher v. Smith*, 4 Ap. Ca. 1, D. P. Stat. 6 E. 7, c. 41, s. 53 (2), ante, p. 421, is to the same effect. As to lien on goods saved from a wrecked ship for expenses incurred by her master's orders, see *Hingston v. Wendt*, 1 Q. B. D. 367. The lien only arises as against one who authorized the work, &c., to be done. *Hollis v. Claridge*, 4 Taunt. 807; and see *Castellain v. Thompson*, 13 C. B., N. S. 105; 32 L. J., C. P. 79. But a railway company has, against the owner, a lien for cloak-room charges (vide ante, p. 655) on a sewing machine deposited there by a person who was bailee thereof under a hire and purchase agreement. *Singer Manufacturing Co. v. L. & S. W. Ry. Co.*, (1894) 1 Q. B. 833.

A master of a vessel has a lien upon the luggage of his passengers for passage money. *Wolf v. Summers*, 2 Camp. 631. Where the goods are delivered in separate quantities at different times, yet if the work be done under one entire agreement, the right of lien for the work expended upon the whole attaches upon every part. *Chase v. Westmore*, 5 M. & S. 180. But

not where there are distinct contracts. *Marks v. Laheè*, 3 N. C. 408. A livery-stable keeper has not a lien upon the horses in his stable for their keep or medicine without an express agreement; *Vorke v. Grenough*, 2 Ld. Raym. 866; *Orchard v. Rackstraw*, 9 C. B. 698; 19 L. J., C. P. 303; *Judson v. Etheridge*, 1 C. & M. 743; though it is otherwise of an innkeeper, unless he receives them as a livery-stable keeper only. *Smith v. Dearlove*, 6 C. B. 132. In *Allen v. Smith*, 12 C. B., N. S. 638; 31 L. J., C. P. 306, two race-horses were brought by their trainer to the defendant's inn, and kept there for more than six months; the horses were taken out to train on the Downs, and were sometimes absent for days at races at which they ran; the defendant stated that he never took in horses to stand at livery; it was held, that it must be presumed that the horses had remained in the hands of the defendant as those of a guest, and that he was entitled to a lien on them for their keep, and see *Johnson v. Hill*, 3 Stark. 172. See further as to lien of innkeeper, *Mulliner v. Florence*, and other cases cited, *ante*, pp. 983, 984. A trainer has a lien for his charge in keeping and training a horse. *Bevan v. Waters*, M. & M. 236. But not if the usage be that the horse should be so far under the control of the owner as to be put under the charge of his servants from time to time during the training, for this shows that a continued possession by the trainer is not contemplated. *Forth v. Simpson*, 13 Q. B. 680. The owner of a stallion has a lien on a mare sent to be covered by the stallion. *Scarfe v. Morgan*, 4 M. & W. 270. There is no lien for the expense or labour incurred by a party in the exercise of his right of detention: thus a shipwright cannot charge or detain for the use of his dock, after the repairs are done, even though he has given notice of his intention to do so after a certain day. *British Empire Co. v. Somes*, 8 H. L. C. 338. It seems that printers have no lien on stereotype plates from which they have printed. *Bleaden v. Hancock*, 4 C. & P. 152.

The seller of goods not sold upon credit has a lien for the price. This lien is now governed by the Sale of Goods Act, 1893. By sect. 38.—(1.), "The seller of goods is deemed to be an 'unpaid seller' within the meaning of this Act—

"(a.) When the whole of the price has not been paid or tendered;

"(b.) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

"(2.) In this part of this act the term 'seller' includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price."

Sect. 39.—(1.) "Subject to the provisions of this act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

(a.) A lien on the goods or right to retain them for the price while he is in possession of them; (b.) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them; (c.) A right of re-sale as limited by this act.

"(2.) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer." *Vide post*, p. 988.

Sect. 41.—(1.) "Subject to the provisions of this act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:—

(a.) Where the goods have been sold without any stipulation as to credit;

(b.) Where the goods have been sold on credit, but the term of credit has expired; (c.) Where the buyer becomes insolvent." *Id.* sect. 62 (3), *ante*, p. 522.

"(2.) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodian for the buyer."

Sect. 42. "Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention."

This lien is not lost so long as the seller keeps possession of the goods as vendor only, even though he has parted with a document transferring a title to the goods. *Imperial Bank v. L. & S. Katherine's Docks Co.*, 5 Ch. D. 195. And now see sect. 41 (2), *supra*. But the document may in terms, or by usage, preclude the lien. *Merchant Banking Co. of London v. Phoenix Bessemer Steel Co.*, *Id.* 205. Where the buyer of goods, to be paid for on delivery, obtains possession of them by giving a cheque for which he has made no reasonable provision, the seller has still a right to the possession, and may maintain trover for them. *Hawse v. Crowe*, Ry. & M. 414.

The mere demand of an excessive sum by a creditor holding a lien, does not dispense with a tender from the debtor of the sum really due; but if the demand of the larger sum is so made that it amounts to an announcement that it is useless to tender any smaller sum, this dispenses with any tender, even if it appear that the debtor was unwilling to tender the amount already due. *Scarfe v. Morgan*, *ante*, p. 985; *The Norway*, B. & L. 404. It is no answer to a special lien, that the plaintiff has a set-off to a larger amount against the defendant, unless there is an agreement to deduct one debt from the other. *Pinnock v. Harrison*, 3 M. & W. 532. See *Clarke v. Fell*, 4 B. & Ad. 404; *Wequelin v. Cellier*, L. R., 6 H. L. 286.

Evidence of lien—Cases in which a lien does not arise.] It was formerly thought that a lien does not arise where there is an express contract between the parties relative to the price, &c., but only in cases of implied contract; but it is now settled that a special agreement does not of itself destroy the right to detain, unless it contains some term inconsistent with that right. Thus, where corn is delivered to a miller to be ground at a certain stipulated sum, *per* load, the miller has a lien for that sum. *Chase v. Westmore*, 5 M. & S. 180. But, where "a mercantile relation, which might involve a lien, is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security, exclude lien and limit their rights, by the extent of the express contract that they have made." *Chambers v. Davidson*, L. R., 1 P. C. 296, 305; *Wylde v. Radford*, 33 L. J., Ch. 51; *In re Bowes*, 33 Ch. D. 586. This principle does not however appear to have been followed in *Angus v. MacLachlan*, 23 Ch. D. 330. As to how far a lien is affected by the special provisions of an Act of Parliament, see *Dresser v. Bosanquet*, 4 B. & S. 460, 486; 32 L. J., Q. B. 57, 374. In *Kirchner v. Venus*, 12 Moo. P. C. 361, the shipper of goods received bills of lading by which they were made deliverable "to order or assigns, he or they paying freight for the goods here, as *per* margin;" the margin of the bills of lading contained the memorandum—"Freight payable in Liverpool to M. one month after sailing, ship lost or not lost;" the shippers became bankrupt, so that the payment was not made at Liverpool; it was held, that the sum to be paid was not freight, and that the shipowner (who was not M.) had no lien therefore as against the indorsees of the bills of lading. See also *Tamraco v. Simpson*, 19 C. B., N. S. 453; 34 L. J., C. P. 268; L. R., 1 C. P. 363; Ex. Ch. If by the agreement

the purchaser of goods is entitled to have the goods immediately, and the payment in respect of them is to take place at a future time, that is inconsistent with the right to retain till payment, and the seller will have no lien for the price. *Craushay v. Homfray*, 4 B. & A. 52. Where wharfage due upon goods is, by the course of trade, payable at Christmas, whether the goods are in the meantime removed or not, there arises no lien on the goods for the wharfage, as against one who has purchased them from the importer, and received a delivery order. *Id.* See *Fisher v. Smith*, 4 Ap. Ca. 1, D. P.

In the case of goods received in railway waggons there is nothing analogous to demurrage, although accepted under a delivery order which professes to make it payable. *Gr. E. Ry. Co. v. Jacob*, (1869) W. N. 210, M. T., C. P.

In general a lien cannot arise at law unless the party claiming it has possession of the goods. *Kinloch v. Craig*, 3 T. R. 119, 783; *Taylor v. Robinson*, 8 Taunt. 648. This is not, however, necessary, in order to establish an equitable lien or charge on the property. See Story, Eq. Jurisp., *infra*, and *Lutscher v. Comptoir d'Escompte de Paris*, 1 Q. B. D. 709. Where a party obtains the possession of goods by misrepresentation, he cannot claim a lien upon them, though, had they come rightfully to his hands, he might have been entitled to retain them. *Madden v. Kempster*, 1 Camp. 12; *Lempriere v. Pasley*, 2 T. R. 485. Goods may be landed so as to preserve the lien of the shipowner; see 57 & 58 V. c. 60, Part vii., cited *ante*, p. 471. The vendor of an estate had at law no lien on the title-deeds after conveyance executed, though the purchase-money is unpaid. *Goode v. Barton*, 1 Exch. 189. He has, however, an equitable lien, or charge upon the estate. *Mackreth v. Symmons*, 15 Ves. 329; 1 White & Tudor L. Cases; see Story, Eq. Jurisp. §§ 1217 *et seq.* In order to establish a lien, it must appear that the work, &c., in respect of which it is claimed, was done at the request of the owner of the goods detained. *Hiscox v. Greenwood*, 4 Esp. 174; *Hollis v. Claridge*, 4 Taunt. 807. See also *Castellain v. Thompson*, *ante*, p. 984.

Evidence of lien—when waived.] By the Sale of Goods Act, 1893, s. 43.—

(1.) "The unpaid seller of goods loses his lien or right of retention thereon—
(a.) When he delivers the goods to a carrier or other bailee or custodian for the purpose of transmission to the buyer without reserving the right of disposal of the goods; (b.) When the buyer or his agent lawfully obtains possession of the goods; (c.) By waiver thereof.

"(2.) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods." See sect. 47, *post*, p. 989.

A party entitled to a lien may waive it, by not insisting upon it, when the goods are demanded from him; as when, instead of relying on a lien, he claims them as his own; *Boardman v. Sill*, 1 Camp. 410, n.; or claims to hold them for a debt due from a third party: *Dirks v. Richards*, 4 M. & Gr. 574; or where the defendant, having a lien for freight, refused to deliver the goods on the ground that he had signed a bill of lading for delivery to a third person; *Thompson v. Trail*, 6 B. & C. 36; or, where the defendant, having a particular lien, refuses to deliver up the goods unless an old balance is paid; in which case an actual tender of the money covered by the particular lien is not necessary. *Jones v. Turleton*, 9 M. & W. 675; see *Weeks v. Goode*, 6 C. B., N. S. 367, and *ante*, p. 986. So, if the defendant claim to hold for two distinct causes of lien, of which only one is good, and conduct himself so that it may be inferred that a tender of the lawful amount would be useless, he thereby dispenses with such a tender. *Kearford v. Mondel*, 28 L. J., Ex. 303. So, he may waive it, by parting with the possession; as,

where the goods are taken in execution at his own suit. *Jacobs v. Latour*, 5 Bing. 130. Where a coachmaker repaired a carriage and allowed the owner to take it away, it was ruled that he could not retain it for past repairs when again brought to him. *Hartley v. Hitchcock*, 1 Stark. 408; *Jones v. Pearle*, Str. 556. And, where the party entitled to a lien wrongfully parts with the goods, the owner may recover them from the holder without tendering what is due on the lien; for a party is only obliged to make a tender where it is necessary to give him the right to the possession of the goods. *Scott v. Newington*, 1 M. & Rob. 252; *Jones v. Cliff*, 1 Cr. & M. 540; *Mulliner v. Florence*, 3 Q. B. D. 484, C. A. Where a bailee of goods who had a lien delivered them to a carrier on account of the bailor, and afterwards stopped the goods *in transitu* and got possession of them again, it was held that the lien did not revive. *Swett v. Pym*, 1 East, 4. But, the lien of an insurance broker (who has a general lien) revives on repossession of the policy. *Whitehead v. Vaughan*, Cooke, Bank. Law, 8th ed. 547; *Levy v. Barnard*, 8 Taunt. 149. And, where horses, on which a livery-stable keeper had by agreement a lien, were fraudulently taken out of his possession by the owner, it was ruled that, the stable-keeper having without force retaken the horses, his lien revived. *Wallace v. Woodgate*, Ry. & M. 193. Where the owner of a ship, having a lien on the goods until the delivery of good and approved bills for the freight, took a bill of exchange in payment, and afterwards negotiated it, it was held that such negotiation amounted to an approval of the bill by him, and that his lien on the goods was waived. *Horneastle v. Farran*, 3 B. & A. 497; *Stevenson v. Blakelock*, 1 M. & S. 535. A lien is not destroyed though the demand, in respect of which it arises, is barred by the Statute of Limitations. *Sprars v. Hurtle*, 3 Esp. 81. As to when the master of a ship can unload the cargo from his ship without losing his lien for freight, *vide ante*, p. 471.

As to waiver of a lien on shares in a company, given it by the articles of association, *vide post*, p. 1099.

[*Stoppage in transitu.*] In trover it frequently happens that the defence arises out of the right of a vendor of goods to stop them *in transitu* upon the insolvency of the vendee. This right is now regulated by the Sale of Goods Act, 1893. By sect. 44, "Subject to the provisions of this act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu*, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price." See also sect. 39 (1) (b), *ante*, p. 986. The seller may exercise the right, though he has received the acceptance of the consignee, without tendering back the bill. *Edwards v. Brewer*, 2 M. & W. 375. A person abroad, who in pursuance of orders from a merchant in this country, purchases goods on his own credit from persons abroad, unknown to the merchant, and consigns them to his principal here, charging him a commission, is a vendor within the rule. *Feise v. Wray*, 3 East, 93; *The Tigress*, B. & L. 38; 32 L. J., P. M. & A. 97. So, also, is a person who sends goods to be sold on the joint account of himself and his consignee. *Newsom v. Thornton*, 6 East, 17. But a third party, who accepts bills drawn for the price of the goods by the vendor, is merely a surety for the price, and is not a vendor or a consignor so as to be entitled to stop the goods *in transitu*. *Siffken v. Wray*, 6 East, 371. The fact that the buyer is a partner in the seller's firm, does not affect the right to stop. *Ex pte. Cooper*, 11 Ch. D. 68, C. A.

Sect. 45.—(7.) "Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped *in transitu*, unless such part delivery has been made under such

circumstances as to show an agreement to give up possession of the whole of the goods."

By sect. 46.—(1.) "The unpaid seller may exercise his right of stoppage *in transitu* either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodian in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

"(2.) When notice of stoppage *in transitu* is given by the seller to the carrier, or other bailee or custodian in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller." A notice to "hold proceeds of goods for P." is not effective as a stoppage *in transitu*. *Phelps, Stokes & Co. v. Comber*, 29 Ch. D. 813, C. A.

Sect. 47. "Subject to the provisions of this act, the unpaid seller's right of lien or retention or stoppage *in transitu* is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

"Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee."

By sect. 62 (1), "document of title to goods" has the same meaning as in the Factors Acts, *vide ante*, p. 957.

Sect. 48.—(1.) "Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage *in transitu*.

"(2.) Where an unpaid seller who has exercised his right of lien or retention or stoppage *in transitu* re-sells the goods, the buyer acquires a good title thereto as against the original buyer."

Stoppage in transitu—continuing transitus.] Sect. 45.—(1.) "Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodian for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodian. (2.) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end. (3.) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodian acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodian for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer. (4.) If the goods are rejected by the buyer, and the carrier or other bailee or custodian continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back. (5.) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of

the master as a carrier, or as agent to the buyer. (6.) Where the carrier or other bailee or custodian wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end." (7.) As to part delivery, *vide ante*, p. 988. A *transitus* is said by Ld. Mansfield to be "every sort of passage to the hands of the buyer." *Stokes v. La Riviere*, cited 3 East, 397. Where there is a contract for the sale of goods, and a delivery has been made to a middleman, who is merely the vehicle between the buyer and seller, the latter, in case of the insolvency of the former, may stop them at any time before they have arrived in such a state, as to be in the actual or constructive possession of the buyer. *Mills v. Ball*, 2 B. & P. 461.

The *transitus* is continuing though the goods have arrived at an intermediate stage. Thus, where goods were ordered by a person at Newcastle, from the plaintiff at Birmingham, and were directed to be sent, by way of London, addressed to the defendant at the Bank Wharf there, with directions to send them by the first vessel to Newcastle, it was ruled that they might be stopped at London; it being merely a stage upon the transit. *Smith v. Goss*, 1 Camp. 282. So, where goods were ordered by a trader at North Tawton from the plaintiff in London, and directions were given to send them to Exeter, to be forwarded to North Tawton, and they were accordingly put into the hands of a wharfinger at Exeter to be forwarded, it was held, that while in his hands they might be stopped by the vendor. *Mills v. Ball*, 2 B. & P. 457. The principle to be deduced from the cases is, that the *transitus* is not at an end, until the goods have reached the place named by the buyer to the seller, as the place of their destination; *per* Bayley, J., *Coates v. Railton*, 6 B. & C. 427; *Edwards v. Brewer*, 2 M. & W. 375; *Ex pte. Watson*, 5 Ch. D. 35; even though no ultimate destination has been named to the seller. *Ex pte. Rosevear China Clay Co.*, 11 Ch. D. 560, C. A. "When the goods have not been delivered to the purchaser, or to any agent of his to hold for him, otherwise than as a carrier, but are still in the hands of the carrier as such and for the purposes of the transit, then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are *in transitu* and may be stopped." *Bethell v. Clark*, 20 Q. B. D. 616, 617, *per* Ld. Esher, M.R. See *Lyons v. Hoffnung*, 15 Ap. Ca. 391, J. C. A cargo was shipped for the account and risk of the vendee, for Falmouth, &c., for orders and a market: the ship arrived at Falmouth, and the master applied for orders: it was held that the transit was not at an end before the giving of these orders. *Fraser v. Witt*, L. R., 7 Eq. 64. As to the effect of delivery in a ship chartered by the buyer, see sect. 45 (5), *ante*, p. 989. Delivery in the buyer's own ship, in general, terminates the transit. *Schotsmans v. Lancashire, &c. Ry. Co.*, L. R., 2 Ch. 332. So, the arrival of the goods at a place where they are to be kept, at the orders of the buyer, in the hands of persons who are to keep them for him, is an end of the *transitus*, although the place be not that of their *ultimate* destination. *Wentworth v. Outhwaite*, 10 M. & W. 436; *Ex pte. Gibbes*, 1 Ch. D. 101. The *transitus* is not determined by delivery, if it appear that the consignee has not taken possession of the goods as owner. *James v. Griffin*, 2 M. & W. 623; see also *Whitehead v. Anderson*, 9 M. & W. 518, 529. By sect. 47, the *transitus* is not determined by a sub-sale, unless assented to by the seller. See *Kemp v. Fulk*, 7 Ap. Ca. 573, D. P.; *Ex pte. Golding, Davis & Co.*, 13 Ch. D. 628, C. A.; even although the bill of lading is made out in the name of the sub-vendee. S. C.

A mere *demand* by the consignee before the end of the voyage will not defeat the right; *Jackson v. Nichol*, 5 N. C. 508; even though the consignee has obtained a delivery order for the goods, from the brokers of the ship and demanded the goods of the chief officer, who promised to comply with the

demand as soon as the goods could be got at. *Coventry v. Gludstone*, L. R., 6 Eq. 44.

Where the goods delivered to a carrier, or other middleman, have been received by the buyer into his own hands, the *transitus* is of course determined. To determine the *transitus* actual and corporal possession by the buyer is not necessary. See *James v. Griffin*, 2 M. & W. 623, 632. Thus, if a man be in the habit of using the warehouse of a wharfinger as his own, and making it a repository for his goods, and disposing of them there, the journey will be at an end when the goods arrive at that warehouse. *Richardson v. Goss*, 3 B. & P. 127. Goods were ordered from the plaintiffs at Manchester by M., the agent of G. of Paris, and were directed to be sent to the house of the defendant, a packer in London; M. had some of the goods unpacked there, and the remainder repacked; he had a general power either to forward the goods to G., or to send them to Holland, &c.: it was held that the defendant received the goods on account of M., and that, as they were to await his disposal in the defendant's warehouse, the *transitus* was there at an end. *Leeds v. Wright*, 3 B. & P. 320; *Scott v. Pettit*, *Id.* 469; *Dixon v. Balduen*, 5 East, 174; *Rowe v. Pickford*, 8 Taunt. 83; *Dodson v. Wentworth*, 4 M. & Gr. 1080; *Heinekey v. Earle*, 8 E. & B. 410; *Kendal v. Marshall*, 11 Q. B. D. 356, C. A. So even where the seller knows the ultimate destination of the goods, though not the name of the consignee. *Ex pte. Miles*, 15 Q. B. D. 39, C. A. When the goods have been delivered to a wharfinger, the question is whether he was in possession *quâ* agent of the buyer, if so the *transitus* is at an end. *Kendal v. Marshall*, *supra*; *Ex pte. Barrow*, 6 Ch. D. 783, citing Benjamin on Sales, 2nd ed. 707 (5th ed. 897). See also *Bethell v. Clark*, 19 Q. B. D. 553; 20 Q. B. D. 615, C. A.; and *Lyons v. Hoffmann*, 15 Ap. Ca. 391, J. C.

Though the goods remain in the actual possession of the carrier, yet, if the buyer have done any act equivalent to taking possession, the right of the seller to stop them is determined. Thus where goods were ordered from the plaintiff at Sheffield, and were sent by waggon directed to the buyer in London, where they were taken to the waggon office, and the provisional assignee of the buyer, who had become bankrupt, put his mark upon them there, being unable to remove them in consequence of an attachment, the *transitus* was held to be at an end. *Ellis v. Hunt*, 3 T. R. 464; and see *Foster v. Frampton*, 6 B. & C. 107.

Upon the same principle it has been held that where goods were ordered to be sent by sea, and the shipmaster gave a receipt to the buyer purporting that the goods were received by him, the right of stoppage was determined; the sellers, by empowering the carrier to give the receipt, having recognised the right of property in the buyer. *Noble v. Adams*, Holt, N. P. 248. On the other hand, where the receipt was given to the sellers, it was held that the captain of the vessel, who had given such receipt, and had afterwards delivered up the bill of lading to a purchaser from the buyer, was liable to the sellers, who had stopped the goods, on the ground that the person holding the receipt has a control over the goods till he has exchanged it for the bill of lading. *Cruven v. Ryder*, *Id.* 100; 6 Taunt. 433; *Ruck v. Hatfield*, 5 B. & A. 632. In *Cowasjee v. Thompson*, 5 Moo. P. C. 165, the plaintiffs had sold lead "free on board" to B. & Co.; by the custom of London, it is the duty of the seller to ship goods so purchased, although the buyer is considered to be the shipper; the plaintiff shipped the lead on board a vessel of which the defendant was owner, and had the mate's receipt: B. & Co. became insolvent, and before the vessel left the docks, and while the receipt was still in their possession, the plaintiffs demanded back their goods, but without success; it was held that there was no right of stoppage, as the delivery to the buyer was perfect, and the retention of the receipt a mere accident.

A stoppage by an unauthorised person, professing to act for the seller,

is inoperative, though ratified by the seller, if such ratification be after the period during which the seller himself could have stopped *in transitu*. *Bird v. Brown*, 4 Exch. 786; *Whitehead v. Anderson*, 9 M. & W. 518. In *Hutchings v. Nunes*, 1 Moo. P. C., N. S. 243, goods were sold and shipped to R. & Co.: before their arrival at the port of discharge, R. & Co. failed; the defendants, who had occasionally acted as agents for the sellers, but then had no instructions, wrote to them of the failure, and offered to protect their interests on the arrival of the ship; the sellers thereupon sent out a power of attorney; after the power was sent, and before its arrival, the cargo was taken possession of by the defendants; it was held that there had been a good stoppage *in transitu*, on behalf of the sellers.

Stoppage in transitu—how defeated or divested.] By sect. 45 (7), *ante*, p. 988, where part delivery of goods has been made under such circumstances as to show an agreement to give up possession of the whole of the goods, the right to stop *in transitu* is defeated. Thus, where 800 bushels of wheat, part of an entire cargo, were delivered, it was held that it must be taken to be a delivery of the whole. *Stubey v. Heyward*, 2 H. Bl. 504. So, where the goods were in the hands of a wharfinger, and the purchaser weighed the whole and took away 25 bales, leaving the remainder on the wharf, it was held that this amounted to taking possession of the whole, and that the privilege of stopping *in transitu* did not attach. *Hammond v. Anderson*, 1 N. R. 69. "There can be no doubt that wherever there is a complete delivery of part of one entire cargo to the consignee, the *transitus* is ended, and the consignor cannot stop the remainder." *Per* Bayley, J., *Crawshay v. Eades*, 1 B. & C. 183. See, however, the observations of Bramwell, L.J., on *Stubey v. Heyward*, and *Hammond v. Anderson*, *supra*, at 14 Ch. D. 455. But where a carrier, having landed a part of the goods on the wharf of the consignee, resumed them, and took the whole to his own premises in order to secure his own demand for freight, this was held not to be such a delivery as to put an end to the consignor's right. *Crawshay v. Eades*, 1 B. & C. 181. If the act of delivering part be not intended to operate as a delivery of the whole, but as a delivery of a portion only, this will not deprive the vendor of his lien on the goods undelivered. *Dixon v. Yates*, 5 B. & Ad. 313; *Bunney v. Poyntz*, 4 B. & Ad. 568; *Tanner v. Scovell*, 14 M. & W. 28; *Bolton v. Lancashire, &c. Ry. Co.*, L. R., 1 C. P. 431, 440; *Ex pte. Cooper*, 11 Ch. D. 68, C. A.; *Kemp v. Falk*, 7 Ap. Ca. 573, D. P.; see *ante*, p. 988.

The most usual way in which the right of a vendor to stop goods *in transitu* is defeated, is by assigning the bill of lading or document of title to a *bonâ fide* assignee for value. See *Lickbarrow v. Mason*, 1 Smith's L. C., and the proviso in S. of G. Act, 1893, s. 47, *ante*, p. 989, which amplifies the terms of the Factors Act, 1889, s. 10, the effect remaining the same. A mere cash receipt for the price of goods to be delivered on its production, is not a document of title to goods within these sections. *Kemp v. Falk*, 7 Ap. Ca. 573, 584, D. P.

The transferor must be in actual and authorised possession of the document, and the transferee must give value on the faith of it, without having notice of any circumstance which would render the transaction neither fair nor honest. *Rodger v. Comptoir d'Escompte de Paris*, L. R., 2 P. C. 393. If the assignee assist in contravening the actual terms of sale on the part of the consignor, or his reasonable expectations arising out of them, or his rights connected therewith, he will stand in the same situation as the consignee. If, for instance, he knows that the consignee has been in insolvent circumstances, and that no bill has been accepted by him for the price, or that, being accepted, it is not likely to be paid, in such case, the interposition of himself between the consignor and the consignee, to assist the latter in

disappointing the just expectations of the former, will be an act done in fraud of the right to stop, and unavailing to the party taking the assignment. *Cuming v. Brown*, 9 East, 514, *per* Ld. Ellenborough, C.J. Therefore, where a person, knowing that the goods are not paid for, takes an assignment of the bill of lading and agrees to pay for them, the goods not having been paid for, he cannot resist the right of the vendor to stop. *Salomons v. Nissen*, 2 T. R. 674. Where the bill of lading had been obtained by the buyer, from the seller's agent, by means of a false representation, this was held not to defeat the right to stop *in transitu*. *The Marie Joseph*, L. R., 1 P. C. 219. But, the knowledge, that the consignor has not received a money payment, but has taken the acceptance of the consignee, will not prevent the assignment from destroying the right to stop. *Cuming v. Brown*, 9 East, 506. *Jones v. Jones*, 8 M. & W. 431. The criterion in these cases is, whether the purchaser takes the assignment fairly and honestly. *Salomons v. Nissen*, 2 T. R. 681; *Cuming v. Brown*, 9 East, 516.

Under sect. 47, *ante*, p. 989, an assignment by the consignee of the bill of lading by way of pledge defeats the right of the vendor, to the extent only of the pledge. So, an unpaid vendor, A., is entitled to have the purchase-money, due to him from his vendee B., satisfied out of unpaid purchase-money, due from the sub-vendee C. to B., if A. stop *in transitu* prior to C. having paid over the latter to B. *Ex pte. Golding, Davis, & Co.*, 13 Ch. D. 628, C. A.; *Kemp v. Fulk*, 7 Ap. Ca. 573, D. P. In *Spaulding v. Ruding*, 6 Beav. 376, it was held that the goods could not be retained as security for a general balance of account, but only for the specific advance made upon the bill of lading. It has, however, since been decided that an indorsement as security for a pre-existing debt is sufficient. *Leask v. Scott*, 2 Q. B. D. 376, C. A.; overruling on this point *Rodger v. Comptoir d'Escompte de Paris*, *ante*, p. 992. The operation of a *bona fide* indorsement to defeat the right to stop *in transitu* is not affected by the Bills of Lading Act (18 & 19 V. c. 111): see sect. 2, cited *ante*, p. 460; *Kemp v. Canavan*, 15 Ir. C. L. R. 216; see also *The Tigress*, B. & L. 38; 32 L. J., P. M. & A. 97, *per* Cur.

Defendant sold to the plaintiff wheat, to be paid for by draft to be remitted on receipt of the bill of lading and invoice; it was shipped, by order of the plaintiff, for and on account of, and at the risk of the plaintiff, and the bill of lading was indorsed by the defendant to the plaintiff; the plaintiff received the bill of lading and invoice, but did not remit any draft; held, that defendant could not stop *in transitu*. *Wilmshurst v. Bowker*, 7 M. & Gr. 828, Ex. Ch.

An actual indorsement and delivery of the bill of lading is not essential to defeat the right of stoppage. The property may be transferred by the consignee under circumstances equivalent to an indorsement. *Dick v. Lumsden*, Peake, 189; *Davis v. Reynolds*, 4 Camp. 267.

The rights of the parties may be effected by the state of things between them, when the bill of lading was signed and indorsed; thus, where the consignor was indebted to the consignee on the balance of accounts, including bills of exchange accepted by the consignee for him, it was held that goods shipped on account of this balance could not be stopped by the consignor, upon the consignee becoming insolvent before the bills were paid. *Vertue v. Jewell*, 4 Camp. 31.

While the goods remain in the hands of the seller's agent, the right to stop them, on the insolvency of the buyer, may also be divested in other ways. Thus, where the seller of goods gave the buyer a delivery order, which he lodged with the wharfinger, A., in whose hands they were, this divested the seller's right, whether A. had or had not transferred the goods in his books into the buyer's name. *Harman v. Anderson*, 2 Camp. 243. So, where goods are lodged in dock, the indorsement of the dock warrant for a valuable

consideration will divest the vendor's right; *Spear v. Travers*, 4 Camp. 251; *Zwinger v. Samuda*, 7 Taunt. 265; and the delivery of the warrant is sufficient without any transfer being made in the books of the dock company. *Keyser v. Suse*, Gow, 58. So, where a warehouseman sold goods, and received warehouse rent from the buyer, *Ld. Ellenborough* ruled that this put an end to the right to stop, as much as if the goods had been removed to the buyer's own warehouse. *Hurry v. Mangles*, 1 Camp. 452. So, the change of mark on bales of goods in a warehouse was held to operate as an actual delivery of the goods. *Stoveld v. Hughes*, 14 East, 308, *per Ld. Ellenborough, C.J.* See also *Cooper v. Bill*, 3 H. & C. 722; 34 L. J., Ex. 161. But, where anything is to be previously done on the part of the seller to ascertain and perfect the specific subject of the sale, such as weighing the goods, &c., an order for delivery may be countermanded before such previous act has been done; *Abbott on Shipping*, 5th ed. 379; 14th ed. 841; and the vendor may consequently stop the goods. *Withers v. Lyss*, 4 Camp. 237; *Shepley v. Davis*, 5 Taunt. 617; *Swanwick v. Sothorn*, 9 Ad. & E. 895. When there is no lien for the price, and the goods have once vested in the purchaser, a redelivery of them to the vendor for repacking will not enable him to stop them. *Talpy v. Gibson*, 4 C. B. 837.

[*Statute of Limitations.*] By the Limitation Act, 1623, 21 J. 1, c. 16, s. 3, actions upon the case (other than for slander), must be brought within 6 years after the cause of such action; an action for the conversion of goods is within this provision. Where the possession was originally legal, the statute runs from the demand and refusal, and no previous demand and refusal will be presumed. *Topham v. Braddick*, 1 Taunt. 577, *per Lawrence, J.* It seems, however, that the defendant may show a previous conversion more than six years ago; but a jury will not be directed to presume one from equivocal evidence, as from an earlier demand by the plaintiff; for this would be setting up the defendant's own wrong to defeat the action. *Philpott v. Kelley*, 3 Ad. & E. 106. Where A.'s title deeds were fraudulently taken by B., and deposited as security with C., who held them without notice of the fraud, the statute did not run until a demand and refusal. *Spackman v. Foster*, 11 Q. B. D. 99. And where C., after six years from the deposit of the deeds with him, transferred them to D., the statute was held to run only from a demand on D., and refusal by him, irrespective of the question whether A. had a previous right of action against C. *Miller v. Dell*, (1891) 1 Q. B. 468, C. A. Where a bailee converts the goods bailed, the owner may sue at once, or wait till he has made a demand to redeliver, which has been refused. See *Wilkinson v. Verity*, L. R., 6 C. P. 206, where the form of action was *detinue*. In *Ringham v. Clements*, 12 Q. B. 260, 267, it was observed by the court that, after an "actual conversion" *by taking*, "no subsequent demand and refusal will constitute a second conversion." As to the effect of fraudulent concealment of cause of action, see *ante*, p. 681.

As to the application of the stats. 3 & 4 W. 4, c. 27, and 37 & 38 V. c. 57, to *heriots*, *vide post*, pp. 1064, 1071.

[*Mitigation of Damages.*] If the defendant only plead that he did not convert the goods, he cannot cross-examine the plaintiff's witnesses to show, in mitigation of damages, that the goods really belonged to a third person. *Finch v. Blount*, 7 C. & P. 478. Whether in an action by a rightful executor against an executor *de son tort*, the latter may prove, in mitigation of damages, that he has paid the debts of the deceased, see *post*, p. 1153, *sub tit. Actions by Executors*. Though a conversion cannot be purged, yet the

defendant may show, in mitigation of damages, that he has returned the goods. *Rutland's (Cs. of) case*, 1 Rol. Abr. 5. See *Moon v. Raphael*, and other cases cited *ante*, pp. 980.

ACTION FOR DETENTION OF GOODS.

In order to maintain this action it is enough to show that the plaintiff is entitled to the possession of goods wrongfully held by the defendant. *Gledstane v. Hewitt*, 1 C. & J. 565. Many of the cases referred to respecting the evidence in an action for conversion, will apply to this action also.

Detention by the defendant.] Detinue does not lie against him who never had possession of the chattel, but it does against him who once had it, but has improperly parted with the possession of it; *Jones v. Dowle*, 9 M. & W. 19; or, has by carelessness lost that which it was his duty to keep safely, as title deeds entrusted to a solicitor. *Reeve v. Palmer, infra*. If a document of title, as a debenture or coupon, or a policy of insurance, be voluntarily given away by A. to B. "to make the best of it for himself," it cannot be recovered by A.'s executors; for the property in the paper passed; though such a transfer by hand may be incomplete for the purpose of transferring any legal interest in the property represented. *Barton v. Gainer*, 3 H. & N. 387; 27 L. J., Ex. 390; *Rummens v. Hare*, 1 Ex. D. 169, C. A. Where the casual finder of an article afterwards loses it, the owner cannot maintain detinue against him. Com. Dig. Detinue (D). Where two or more jointly interested in a chattel, deposit it with a stranger, a demand by one in his own name only, and not on behalf of all, will not entitle him to maintain detinue for it. *Atwood v. Ernest*, 13 C. B. 881; 22 L. J., C. P. 225.

Detinue will lie for the detention of *specific* coins belonging to the plaintiff. But owing, it would seem, to the difficulty of identifying the coins with sufficient accuracy to maintain the action, it is somewhat loosely laid down in the old authorities that detinue does not lie for money, not in any bag or chest, because detinue must be for a certain thing, as of money in bags. *Fitzherb. Nat. Brev.* 138; *Jenkins Cent.* 207.

Where the defendant has lost the plaintiff's goods by negligence, as where a solicitor loses his client's title deeds, the mere fact of loss is not a defence; for this is setting up his own wrongful act; and detinue lies though the demand be after the loss. *Reeve v. Palmer*, 5 C. B., N. S. 84; 27 L. J., C. P. 327; 5 C. B., N. S. 91; 28 L. J., C. P. 168, Ex. Ch. But, a loss by mere accident, without negligence is an answer. S. C.; *Roux v. Wiseman*, 1 F. & F. 45; Com. Dig. Detinue (D). The giving notice by the defendant to a trustee or stakeholder, not to hand over the property to the plaintiff does not render the defendant liable to an action of detinue. *Latter v. White*, L. R., 5 H. L. 578.

Property or possession, of the plaintiff.] Detinue is frequently brought to recover the title deeds of real estate; the proper plaintiff is the person in whom the legal estate is vested. See *Atkinson v. Baker*, 4 T. R. 229. Thus, the tenant for life is entitled to recover the deeds from the remainderman. *Atwood v. Heywood*, 1 H. & C. 745; 32 L. J., Ex. 153; *Leathes v. Leathes*, 5 Ch. D. 221. See Thomas' note (o) to *Buckhurst's, Ltd., case*, 1 Rep. 2 b. And, on the death of a tenant for life the reversioner may recover the deeds from a person with whom they have been deposited by the tenant for life, as security

for an advance. *Easton v. London*, 33 L. J., Ex. 34. So, where A. mortgaged to the plaintiff a freehold estate, and the deed purported to convey "all deeds," &c., and A. afterwards deposited the original deeds with a banker as a security; held, that the plaintiff might recover them from the banker in detinue. *Newton v. Beck*, 3 H. & N. 220; 27 L. J., Ex. 272. Where the title deeds of an estate are bailed, the bailor cannot maintain the action if he have parted with the estate since the bailment. *Philips v. Robinson*, 4 Bing. 106; following Vin. Abr. Detinue (C), pl. 2. Where several persons have interests in a deed any of them having possession can retain it against the others; *Foster v. Crabb*, 12 C. B. 136: and so can a stranger with whom it has been lawfully bailed for safe custody; *Wright v. Robotham*, 33 Ch. D. 106, C. A. The interests may, however, be subject to an agreement that one of the co-owners shall have possession, as where N., the owner of a gold box, sold a half share in it to F., on the terms that N. should have possession of it till it was sold; N. intrusted the box to F. to take to an auctioneer for sale, and F. deposited it with H. as security for his own debt to H.; it was held that N. had a special property in the box which entitled him to recover it from H. *Nyberg v. Handeluar*, (1892) 2 Q. B. 202, C. A. Where there has been an equitable deposit of deeds, to secure a loan, detinue will not lie for their recovery till payment, although a tender has been refused. *Bank of New South Wales v. O'Connor*, 14 Ap. Ca. 273, J. C. A lessor is not entitled as against the lessee to the possession of the lease, though the term has expired, whether by afflux of time or by forfeiture; *Hall v. Ball*, 3 M. & Gr. 242, 243; *Elworthy v. Sandford*, 3 H. & C. 330; 34 L. J., Ex. 42; or by surrender by operation of law. *Knight v. Williams*, (1901) 1 Ch. 256.

The receiver of letters has such a property in the paper on which they are written, as that he may maintain an action of detinue against the sender, if by any means the letters get back into the possession of the latter. *Oliver v. Oliver*, 11 C. B., N. S. 139; 31 L. J., C. P. 4. Where a debtor sends his creditor half a bank note, intending afterwards to send him the second half in satisfaction of his debt, the property in the first half so sent remains in the sender until he remits the second half, and the creditor is bound to restore it to him on demand. *Smith v. Mundy*, 3 E. & E. 22; 29 L. J., Q. B. 172. A. obtained from the Herald's College a grant of arms to be borne by him and his descendants, and the descendants of his deceased brother B.; it was held that the sons of B. had not such an exclusive interest in the grant, as to entitle them after A.'s death, to maintain an action of detinue against A.'s widow, who retained possession of it, and to whom all A.'s household effects were bequeathed. *Stubs v. Stubs*, 1 H. & C. 257; 31 L. J., Ex. 510.

Damages—Return of property.] In detinue, the damages are in general merely nominal; but the jury find the value of the articles detained, and the common law judgement is, that the plaintiff recover the articles or their value, together with the damages and costs found by the verdict, and the costs of increase. See *Phillips v. Jones*, 15 Q. B. 859; 19 L. J., Q. B. 374, Ex. Ch. Special damages may, it would seem, be recovered for the detention, if laid in the statement of claim. See *Williams v. Archer*, 5 C. B. 318; *Crossfield v. Such*, 8 Exch. 159; 22 L. J., Ex. 65; *Wiley v. Crawford*, E. B. & E. 253; 30 L. J., Q. B. 319, Ex. Ch.; and *Dreyfus v. Peruvian Guano Co.*, 42 Ch. D. 66; 43 Ch. D. 136, C. A., varied in D. P. (1892) A. C. 166. And by Rules, 1883, O. xxxvi. r. 58, "Where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of the assessment." Where there are separate parcels of goods, the jury ought to find the value of each; for the defendant may, perhaps, give up some in specie, and pay damages for the rest. *Pawly v. Holly*, 2 W. Bl. 853; *Sandford*

v. *Alcock*, 10 M. & W. 689. Special damage may be recovered although the goods were before action given up under a magistrate's order made under 2 & 3 V. c. 71, s. 40. *Midland Ry. Co. v. Martin*, (1893) 2 Q. B. 172.

By Rules, 1883, O. xlii. r. 6, "A judgment for the recovery of any property, other than land or money, may be enforced (a) by writ for the delivery of the property." And by O. xlviii. r. 1, "The court or a judge may, upon the application of the plaintiff, order that execution shall issue for the delivery of the property, without giving the defendant the option of retaining the property upon paying the value assessed, if any, and that if the property cannot be found and unless the court or a judge shall otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the sheriff's bailiwick till the defendant deliver the property; or at the option of the plaintiff, that the sheriff cause to be made of the defendant's goods the assessed value, if any, of the property." And by r. 2, "The plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages and costs awarded, and interest." These rules replace C. L. P. Act, 1854, s. 78, now repealed by 46 & 47 V. c. 49. O. xlviii. does not apply unless the value of the chattel has been assessed. *Corbett v. Lewin*, W. N. 1884, p. 62, Field, J., following *Chilton v. Carrington*, 15 C. B. 730; 24 L. J., C. P. 78. It has been suggested that an order for delivery would only be made on such just allowances being made by the plaintiff as would be made in assessing damages in trespass or trover, and that the value would be assessed on the same basis, *vide ante*, pp. 939, 980. *Dreyfus v. Peruvian Guano Co.*, (1892) A. C. 176, n., 186, *per* Lds. Macnaghten and Watson. As to damages where a receiver has been appointed, *vide* S. C.

Costs.] This action is to be treated as "founded on tort" for the purposes of the County Courts Act, 1888, s. 116, *ante*, pp. 301 *et seq.* *Bryant v. Herbert*, 3 C. P. D. 389, C. A.

Defence.

By Rules, 1883, O. xix. r. 17, a defendant cannot now plead a general denial of the allegations in the statement of claim, and r. 15 requires him to state all such facts on which he relies, as do not appear therein, and if not stated would be likely to take the plaintiff by surprise. *Vide ante*, p. 309.

Leave and Licence.] This defence is not supported by proof of a delivery by the plaintiff to the defendant, in the supposed performance of a contract which never existed. *Gregson v. Ruck*, 4 Q. B. 737.

Illegality.] Where goods have been deposited or pledged with the defendant as part of an illegal or immoral agreement, the maxim "*in pari delicto potior est conditio defendentis*" applies, and the plaintiff cannot recover them. *Taylor v. Chester*, L. R., 4 Q. B. 309.

Statute of Limitation.] By the Statute of Limitation, 1623, 21 J. 1, c. 16, s. 3, an action of detinue must be brought within 6 years after the cause of such action. The possession of title deeds should go with the estate, to which they belong, and as long as a person is apparent owner of an estate, occupying it under a title, the possession of the title deeds is not adverse to the real owner, and the statute does not begin to run till it turns out that the person, having the deeds, is not entitled to keep them. *Plant v. Cottonell*, 5 H. & N. 430; 29 L. J., Ex. 198. As to the time when the statute begins to run in the case of deeds fraudulently pledged, see *Spackman v. Foster*, 11 Q. B. D. 99;

and in the case of successive detentions, see *Miller v. Dell*, (1891) 1 Q. B. 468, C. A.; and of a bailment, see *Wilkinson v. Verity*, L. R., 6 C. P. 206, which cases are cited *ante*, p. 994.

ACTION FOR THE RECOVERY OF LAND.

General Evidence for the Plaintiff.

The proceedings in the action of ejectment were entirely altered by the C. L. P. Act, 1852, ss. 168—222. The J. Acts and Rules thereunder, again modified the practice, and the name “action for the recovery of possession of land” has been substituted for that of ejectment, although the latter name is for brevity hereinafter frequently used. The action is commenced by a writ, and followed by pleadings as in other actions. The C. L. P. Act, 1852, ss. 168—207, have been repealed by 46 & 47 V. c. 49, and the practice under those sections is no longer in force, *vide ante*, p. 755.

The pleadings will now show the right to possession on which the plaintiff relies, and which he must prove at the trial. See Rules, 1883, O. xix. rr. 2, 4; App. C. sect. vii., *Phillips v. Phillips*, 4 Q. B. D. 127, C. A., and *Davis v. James*, 26 Ch. D. 778. As to the manner in which the defendant may plead his defence, *vide post*, pp. 1062, 1063. It seems that the jury must still find which of the plaintiffs, if more than one, is entitled, and whether to the whole, or to what part; O. xvi. r. 1, replacing C. L. P. Act, 1852, s. 180. Where the plaintiff succeeds as to part only of the land, the verdict is entered distributively, and the costs are taxed accordingly under O. lxxv. r. 1, *ante*, p. 296; *Jones v. Curling*, 13 Q. B. D. 262, C. A. As to the effect of the opposite party not appearing at the trial, *vide ante*, p. 291.

As to which party is to begin at the trial, *vide ante*, p. 286.

Proof of a sufficient title.—By mere possession.] The plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's. *Martin v. Strachan*, 5 T. R. 107, 110, n. A title gained by the old Statute of Limitations has been held sufficient in ejectment; *Stocker v. Berny*, 1 Ld. Raym. 741; *Cholmondeley v. Clinton*, 2 J. & W. 156; although the defendant may have been in possession for several years next before the suit. *Doe d. Harding v. Cooke*, 7 Bing. 346. And the stats. 3 & 4 W. 4, c. 27, s. 34, and 37 & 38 V. c. 57, s. 1, *post*, pp. 1069, 1064, by expressly extinguishing all right and title of the party out of possession, give a clear title to him who has been in possession, or in the receipt of the rent for 12 (formerly 20) years, by himself, or by those through whom he claims. *Scott v. Nixon*, 3 Dru. & War. 388; *vide post*, *Defence*, p. 1070. Mere possession for less than 12 (formerly 20) years is *prima facie* evidence of title, and (no other interest appearing in proof) evidence of seisin in fee. *Allen v. Rivington*, 2 Wms. Saund. 111; *Doe d. Smith v. Webber*, 1 Ad. & E. 119; *Doe d. Carr v. Billyard*, 3 M. & Ry. 111; *Doe d. Carter v. Barnard*, 13 Q. B. 945, 953; B. N. P. 103; and the dictum of Holroyd, J., in *Harper v. Charlesworth*, 4 B. & C. 574, 592—4, *contra*, is not law. Where the defendant forcibly expelled the plaintiff, who had been in possession for a year as tenant, Ld. Tenterden, C.J., ruled this to be sufficient proof of title as against the defendant, who showed none. *Doe d. Hughes v. Dycball*, M. & M. 346; S. C., 3 C. & P. 610. So, where a man enclosed waste land, and died after he had been in possession less than 20 years, the heir of the person to whom he had devised it, was held entitled to maintain ejectment against a person who had entered upon the land, and could not show title or possession prior to the

testator. *Asher v. Whitlock*, L. R., 1 Q. B. 1. And plaintiff may, in such a case, recover on proof of prior possession, though he has attempted, without success, at the trial to show another title. *Davison v. Gent*, 1 H. & N. 744; 26 L. J., Ex. 122. But, after a verdict on the title relied upon, it is then too late to rely on mere possession, on a motion for a new trial. *Doe d. Woodhouse v. Powell*, 8 Q. B. 576. It has been held that a mere wrong-doer may set up the title of a third party, or avail himself of any such title appearing in the plaintiff's evidence. *Doe d. Carter v. Barnard*, *ante*, p. 999. And the proposition laid down in the judgment in *Asher v. Whitlock*, L. R., 1 Q. B. 6, 7, *ante*, p. 999, that "possession is good title against all but the true owner," although correct under the particular facts of that case would, as a general principle, appear to be somewhat too large. The lessee for years of a copyholder, may recover as against any one but the lord, without proof of a custom or licence to demise for years. *Doe d. Tresidder v. Tresidder*, 1 Q. B. 416.

A tenant who has come in under, or paid rent to another, cannot in general dispute his title, see *post*, pp. 1006 *et seq.* And a party may be estopped from disputing the title of another in this action, by having referred the question of right to an arbitrator, who awarded in favour of the plaintiff. *Doe d. Morris v. Rosser*, 3 East, 11. So where the question of tenancy and rent had been submitted to the M. R. by an amicable suit, the tenant could not dispute the plaintiff's title to rent, after acquiescence in the decree of the M. R. against him. *Allason v. Stark*, 9 Ad. & E. 255.

Proof of a sufficient title.—By receipt of rent and profits.] On the same principle on which a person in possession is held to have a good title against everybody except the legal owner of the estate, a person who is reversioner, by reason of the payment of rent to him, has a good title against any person not the real owner of the estate. *Daintry v. Brocklehurst*, 3 Exch. 207, *per* Parke, B.; *Doe d. Lichfield v. Stacey*, 6 C. & P. 139. This proposition is, however, as above observed, somewhat too broad to be universally true; but it is quite clear that the receipt of the rents and profits of land, as evidence of title, stands on the same footing as actual possession.

Title, at what time.] The plaintiff must also show that he had a right of entry at the time mentioned in the writ, (B. N. P. 105), not barred by the Statute of Limitations; otherwise, he cannot recover. *Cole*, Eject. 6; *Mohima v. Mohesh*, L. R., 16 Ind. Ap. 23, 26, *per* J. C. If his right to enter, therefore, have accrued more than 12 (formerly 20) years before the bringing of the action, he must be prepared to show himself within some of the exceptions in the statute. See the statute, *post*, *Defence*, pp. 1063 *et seq.* The plaintiff could formerly claim in the writ the land as from a prior date; but under the J. Acts, the only date mentioned in the writ is its date (see Rules 1883, App. (A.) Part I., No. 1); that date must never be earlier than the day on which the title could formerly have been laid in the writ. The plaintiff may, however, for the purpose of recovering mesne profits from an earlier day, lay his title, or, in other words, claim the right of possession of the premises from such last-mentioned day.

An heir-at-law may lay his title on the day on which his ancestor died. *Roe d. Wrangham v. Hersey*, 3 Wils. 274. And, a posthumous child taking lands by way of remainder under statute 10 & 11 W. 3, c. 22 (c. 16 Ruff.), may lay his title on the day of his father's death; *semble*, *per* Ld. Hardwicke, B. N. P. 105. Where a person came lawfully into possession, so that ejectment cannot be maintained until such possession has been determined by demand or otherwise, the title must be laid after the demand. *Right v. Beard*, 13 East, 210; *Doe d. Loscombe v. Clifford*, 2 Car. & K. 448. So,

where there has been a tenancy at will, the title cannot be laid on a day antecedent to the determination of the will. *Goodtitle d. Gallaway v. Herbert*, 4 T. R. 680. See *post*, pp. 1009, 1010. But, in ejectment by a mortgagee against a mortgagor in possession, the title may be laid on a day anterior to the actual determination of the will; *per* Buller, J., *Birch v. Wright*, 1 T. R. 383. But, if a clause be inserted in the mortgage-deed that the mortgagor shall continue in possession until default made in payment, on a day fixed, this amounts to a re-demise, and the title must be laid on a day subsequent to the time for payment. *Wilkinson v. Hall*, 3 N. C. 508. See *post*, *Action for recovery of land by mortgagee*, p. 1057. But, the day on which the title is laid may be amended at N. P., so as to suit the proof of title. *Doe d. Edwards v. Leach*, 3 M. & Gr. 229; *Doe d. Simpson v. Hall*, 5 M. & Gr. 795; and see Rules, 1883, O. xxviii. r. 1, *ante*, p. 291.

Title, in whom.] All the persons in whom the title is alleged to be should be named in the writ, and the jury at the trial will find which of them are entitled, and whether to the whole, or to what part. Rules, 1883, O. xvi. r. 1, replacing C. L. P. Act, 1852, s. 180. The judge, at the trial, may, under Rules 1883, O. xvi. rr. 2, 11, *ante*, p. 90, add the names of any persons as plaintiffs, in whom it turns out that the legal estate is vested. See cases cited *ante*, pp. 90, 91, and *Blake v. Done*, 7 H. & N. 465; 31 L. J., Ex. 100, decided under the C. L. P. Act, 1852, ss. 35, 222. If several joint tenants or co-parceners join, the whole may be recovered. *Doe d. Marsack v. Read*, 12 East, 57; *Doe d. Lulham v. Fenn*, 3 Camp. 190. And such is the case now also, with tenants in common. *Elliss v. Elliss*, E. B. & E. 81; 27 L. J., Q. B. 316. If a term vest in executors, the whole land may be recovered under a claim by any of them. *Doe d. Stace v. Wheeler*, 15 M. & W. 623. The same principle would seem to apply to freeholds where the testator died after Dec. 31st, 1897, *vide post*, pp. 1060, 1061. The payment of one entire rent to the common agent of the plaintiffs is *prima facie* evidence of their title as joint tenants. *Doe d. Clarke v. Grant*, 12 East, 221. The foregoing authorities, however, do not seem to apply to the case of co-tenants, or other persons having distinct interests or estates, who have actually made a joint lease, and who bring ejectment to recover possession of the demised premises from the lessee, or any one claiming under him. In such a case, it seems to be immaterial what interest any co-lessor has, or whether he has any; for the tenant is estopped by the lease. But where the several interests of the joint lessors appeared by recital in the lease, it was doubtful whether they could formerly recover as joint tenants, although a joint right of re-entry had been reserved. *Doe d. Campbell v. Hamilton*, 13 Q. B. 977. But no such difficulty seems to arise under the present procedure. See Rules 1883, O. xvi. rr. 1, 11, *ante*, pp. 90, 91. See further, *Action for recovery of land by landlord*, *post*, p. 1006.

Proof of registered title.] Freehold land may be registered under the Land Transfer Act, 1875 (38 & 39 V. c. 87), with an absolute, qualified or possessory title, sects. 7, 8, 9; a land certificate is then given to the proprietor by the registrar, sect. 10; so leasehold property may be registered with or without a declaration of absolute title of lessor to grant the lease, sects. 13, 14; an office copy of the lease is then given by the registrar; sect. 16. Charges may be entered on the register and certificates thereof granted, sect. 22. By sect. 80, "any land certificate or certificate of charge shall be *prima facie* evidence of the several matters therein contained, and the office copy of a registered lease shall be evidence of the contents of the registered lease." By sect. 107, the office of land registry shall have a seal, and by sect. 120 each district registry office shall also have a seal, "and any instrument

purporting to be sealed with such seal shall be admissible in evidence, and, if a copy, the same shall be admissible in like manner as the original." There is no similar provision with reference to the seal of the principal office, but this is presumably supplied by 8 & 9 V. c. 113, s. 1, *ante*, p. 100, or 14 & 15 V. c. 99, s. 14, *ante*, p. 161.

By the Land Transfer Act, 1897 (60 & 61 V. c. 65), s. 8 (4), subject to any registered estates, charges, or rights, a deposit of the land certificate or office copy of lease shall, for the purpose of creating a lien on the land to which they relate, be equivalent to a deposit of the title deeds. By sect. 20, in a county or part of a county in which registration of land has by Order in Council on and after a certain day been made compulsory on sale, a person shall not under any conveyance on sale, executed on or after that day, acquire the legal estate in any freehold land in that county or part of a county, until he is registered as proprietor of the land. By sect. 24 (1), in these acts all hereditaments are deemed land, but registration of title is not compulsory as to an incorporeal hereditament, or mines, &c., apart from the surface, or a lease for less than 40 years, or two lives yet to fall in, or an undivided share in lands, and some other cases. Such Order in Council under sect. 20, has been made only in respect of the county and the city of London; see Brickdale and Sheldon on the Land Transfer Acts, 2nd ed., 337.

Proof of title.—Legal estate.] The plaintiff must formerly always have proved a *legal* title, an equitable title was not sufficient. *Doe d. Shewen v. Wroot*, 5 East, 138; *Doe d. North v. Webber*, 2 N.C. 922. By the J. Act, 1873, s. 24 (1), *ante*, p. 306, the court is to give the plaintiff the same relief on an equitable title that the Court of Chancery would formerly have given, and where the equitable owner is entitled to possession, as against the person in possession, he is bound only to prove an equitable title. See *General Finance, &c. Co. v. Liberator, &c. Building Soc.*, 10 Ch. D. 24, *per* M.R. But, the effect of the act is not to abolish the distinction between legal and equitable titles. *Joseph v. Lyons*, 15 Q. B. D. 280, C. A.; *Clements v. Matthews*, 11 Q. B. D. 814, *per* Cotton, L.J. See further, *post*, pp. 1011, 1029. By sect. 25 (5), *ante*, p. 307, a mortgagor entitled to the possession of land, may sue for the recovery thereof in his own name, if his mortgagee have not given notice of his intention to enter into possession, or receipt of the rents and profits thereof. See hereon *Matthews v. Usher*, *post*, p. 1008. In other cases, however, the person in whom the legal estate is vested must be a plaintiff in the action; it is therefore still material to consider where it is vested. Thus it is sometimes necessary to consider at N. P. whether a use is executed so as to give the legal estate to the *cestui que use*. The general rule is, that, in the case of passive trusts created by deed or will, the use must either be reduplicated, if limited on a freehold, or must be limited on a term of years; otherwise a legal estate passes. Thus, if the feoffment is to A. and his heirs, to the use of, or in trust for, B. and his heirs, the estate of B. is a legal seisin in fee. But, if the conveyance is to A. and his heirs, to the use of B. and his heirs, to the use of C. and his heirs, then B. has a legal, and C. only an equitable, estate. So, if the conveyance is to A. and his heirs, to the use of, or in trust for, A. and his heirs, to the use of B. and his heirs, B. has only an equitable interest. *Doe d. Lloyd v. Passingham*, 6 B. & C. 305; 1 Steph. Com. B. 2, Pt. 1, c. 9. Where the estate limited to a use is a leasehold or chattel interest, the Statute of Uses is inoperative, and the use limited is a mere trust. *Id.*

With regard to grants and devises in trust, the rule is that where something is to be done by the trustees which makes it necessary for them to have the legal estate, such as the payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rates and taxes, and keep the

premises in repair, or the like, the legal estate is vested in them, and the beneficial grantee or devisee has only an equitable estate. See the note to *Jefferson v. Morton*, 2 Wms. Saund. 11 b, *et seq.* (17), and the cases there collected. See also *Poad v. Watson*, 6 E. & B. 606; *Berry v. Berry*, 7 Ch. D. 657; *Davies to Jones*, 24 Ch. D. 190. Where the trustees are to pay debts, they take the legal fee. *Spence v. Spence*, 12 C. B., N. S. 199; 31 L. J., C. P. 189; *In re Tanqueray-William & Landau*, 20 Ch. D. 465, C. A. But a mere charge for the payment of debts will not give the trustees the legal estate, unless the testator intends that they shall be active in paying the debts. *Kcurick v. Beauclerk*, 3 B. & P. 175. A trust to receive the rents and profits, and pay them over, vests the legal estate in the trustee. *Doe d. Gratex v. Homfray*, 6 Ad. & E. 206. A trust to permit and suffer the *cestui que trust* to receive the rents and profits, vests it in the *cestui que trust*. *Broughton v. Langley*, 2 Salk. 679. A devise to trustees in trust to pay to or permit and suffer to receive, &c., gives the legal estate to the *cestui que trust*; because, being inconsistent, the last words shall prevail in a will. *Doe d. Leicester v. Biggs*, 2 Taunt. 109; *Baker v. White*, L. R., 20 Eq. 166; *In re Adams & Perry's Contract*, (1899) 1 Ch. 554. Yet where the trustees under a like devise were to repair, to let, &c., it was held that they took the legal estate. *White v. Parker*, 1 N. C. 573. And where the trust as to three undivided parts out of four, required the legal estate to be in the trustees, it was held to vest in them as to the whole. *Id.* See further, *Van Gratten v. Foxwell*, (1897) A. C. 658, D. P. At common law, if an estate be devised to trustees for purposes which are to last only for a certain time, the use of the word "heirs" will not give the fee; the devise will be cut down to the time necessary for the purposes. But, if the fee be given in terms with trusts that extend over an indefinite time, it is not so; and if no particular time can be fixed at which the trusts shall end, the estate cannot be cut down. *Per Patteson, J.*, in *Doe d. Davies v. Davies*, 1 Q. B. 430, 438; and see *per Bayley, J.*, in *Houston v. Hughes*, 6 B. & C. 421; and in *Doe d. Player v. Nicholls*, 1 B. & C. 342. See also *Doe d. Tomkyns v. Willan*, 2 B. & A. 84; and *Collier v. Walters*, L. R., 17 Eq. 252. The same rules apply to a bequest of leaseholds; *Stevenson v. Liverpool, Mayor of*, L. R., 10 Q. B. 1; or, of copyholds; *Doe d. Woodcock v. Barthrop*, 5 Taunt. 382; *Baker v. White*, *supra*.

In the case of wills made or revived after the 31st December, 1837, the Wills Act (1 V. c. 26), by sect. 30 enacts that a devise of real estate (not being a presentation to a church) to a trustee or executor, will pass the whole estate which the testator had power to dispose of by will, unless a definite term of years, absolute or determinable, or an estate of freehold be given expressly or by implication: and by sect. 31, where any real estate is devised to a trustee without any express limitation of the estate to be taken, and the beneficial interest in it, or in the surplus rents and profits of it, is not given to any person for life,—or is so given, but the purposes of the trust may continue beyond the life of the person,—such devise is to be construed to pass to the trustee the whole legal estate which the testator had power to dispose of by will, and not an estate determinable when the trust is satisfied.

Where registration has been made compulsory on sale, the purchaser does not acquire the legal freehold estate until registration as proprietor, *vide ante*, p. 1001.

Proof of legal title.—Presumption of surrender of terms.] The following are a few cases representing the law of presumed surrender of outstanding terms before 8 & 9 V. c. 112. See *post*, p. 1003.

Where the legal estate was vested in a trustee, and there was no direct

evidence of a conveyance or surrender to the *cestui que trust*, it was held that a jury might sometimes presume such conveyance or surrender. *Lade v. Holford*, B. N. P. 110; *Goodtitle d. Jones v. Jones*, 7 T. R. 45. On the same principle, where an estate was directed to be conveyed to A. on his attaining his majority, it was held that a jury might, within four years from that time, presume that it was so conveyed by the trustees. *England v. Slade*, 4 T. R. 682. So, where it was for the interest of the owner of the inheritance that a satisfied term should be considered as surrendered, and it appeared that no beneficial purpose could be answered by the continuance of the term, a surrender might be presumed. *Doe d. Burdett v. Wright*, 2 B. & A. 710. *Accord. Doe d. Putland v. Hilder*, *Id.* 782. But in *Doe d. Blacknell v. Plowman*, *infra*, and in *Aspinall v. Kempson*, Sugd. V. & P., 8th ed., 446, *cor.* Lord Eldon, C., the doctrine held in the above cases was questioned; and the court will not presume a surrender, unless there has been a dealing with the estate, in a way in which reasonable men, and men of business, would not have dealt with it, unless the term had been put an end to. *Garrard v. Tuck*, 8 C. B. 231; see also *Cottrell v. Hughes*, 15 C. B. 532; 24 L. J., C. P. 107; and, in Sugd. V. & P. 14th ed., 621, *Doe d. Putland v. Hilder*, *supra*, is considered by Lord St. Leonards as overruled.

The mere fact of a term being satisfied furnishes no ground from which the jury can presume it surrendered. *Evans v. Bicknell*, 6 Ves. 185. There ought to be some dealing with the term, to authorize such a presumption. S. C. *Doe d. Rees v. Williams*, 2 M. & W. 749. Where a term has been expressly assigned to attend the inheritance, and there has been no act of omission inconsistent with the existence of the term, there is less ground to presume a surrender from the mere lapse of time, and silence of the party who possesses the inheritance. *Doe d. Blacknell v. Plowman*, 2 B. & Ad. 573. So, the recognition of the term as subsisting at a late period; *Doe d. Graham v. Scott*, 11 East, 478;—the fact that it would have been contrary to the duty of the trustees to surrender the estate; *Keene v. Deardon*, 8 East, 267;—or, that the original enjoyment of the party, who sets up the presumed conveyance, was consistent with the fact of there having been no conveyance; *Doe d. Fenwick v. Reel*, 5 B. & A. 237;—are all circumstances from which a jury may infer that no conveyance has taken place. A. devised an estate to trustees for years, with remainder to B., who 18 years after the death of A., treated the estate as his own freehold, and leased it for lives; it was held that the jury ought not to presume a surrender; and, *per* Bayley, B., “Is there any case where a surrender has been presumed within 20 years? I do not think that a jury ought to be required to presume what they do not believe. . . . In the present case, if a surrender had really taken place, it must have been known to many individuals.” *Day v. Williams*, 2 C. & J. 460. “No case can be put in which any presumption has been made, except where a title has been shown by the party, who calls for the presumption, good in substance, but wanting some collateral matter necessary to make it complete in point of form.” *Per* Tindal, C.J., *Doe d. Hammond v. Cooke*, 6 Bing. 179.

[*Satisfied Terms Act*, 1845.] Such was the state of the law before the passing of the Satisfied Terms Act, 1845, 8 & 9 V. c. 112. This stat. by sect. 1 enacts, that every satisfied term, which was, on 31st December, 1845, either by express declaration or construction of law, attendant on the inheritance of any land, shall on that day cease as to such land; but that the term, so attendant by express declaration, shall notwithstanding afford to every one the same protection against charges, actions, claims, &c., as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with, after that day; and shall for the purpose of such

protection be considered in every court of law and equity to be a subsisting term.

It is not clear whether the effect of the statute is only to afford a protection against claims, or to give a title; it would rather seem, however, that it is the former only. See *Doe d. Cadwalader v. Price*, 16 M. & W. 603. And in such cases the defendant will, perhaps, only be required to show the existence of the term on the 31st December, 1845, and that it was then attendant by express declaration. If the latter is the effect of the statute, it is not clear what should be the course of proceeding where the real claimant seeks to avail himself of the statute, more especially where the termor, living in 1845, has since died. As the statute was made for the benefit of persons justly entitled, a defendant would probably not be able to avail himself of the statute, except in cases where equity would not formerly have restrained him from setting up the term. *Doe d. Hare v. Mouldsdale*, 16 M. & W. 689; *Cottrell v. Hughes*, 15 C. B. 532; 24 L. J., C. P. 107.

A. created a mortgage term in 1813 to B., under which possession was taken by B.'s executor, and the mortgage was paid off by A.'s heir in 1837, and possession taken by him, no assignment of the term was, however, made till after A. had in 1840 leased the property to C., and in 1843 mortgaged it to D., when B.'s executor, by A.'s direction, assigned the term in trust for D.: it was held that, in an action of ejectment by C. against A.'s heir on the lease, the term was an answer, for it was assigned in trust for the mortgagee, and the act did not apply. *Owen v. Owen*, 3 H. & C. 83; 33 L. J., Ex. 237.

Sect. 2 relates to terms subsisting or thereafter created, and becoming satisfied since 31st December, 1845, and which, after that day, shall become attendant either by express declaration or construction of law; and it enacts that every such term shall, immediately on its becoming so attendant, absolutely cease as to the land upon the reversion whereof it shall become attendant. In order that the term should cease under this section, it must have become attendant on the legal inheritance; *Doe d. Clay v. Jones*, 13 Q. B. 774; and the term must be satisfied. *Anderson v. Pignet*, L. R., 8 Ch. 180.

Where a term is to attend the inheritance, it can only be dealt with by those who are entitled to the inheritance; and therefore an assignment by a tenant for life is inoperative. *Plant v. Taylor*, 7 H. & N. 211; 31 L. J., Ex. 289.

Proof of legal title.—Estoppel.] The defendant may, in some cases, disprove the legal title of the party through whom both he and the plaintiff claim. Thus, where the plaintiff claims under a conveyance from A. B. in 1818, and the defendant under a conveyance from A. B. in 1824, the defendant may show that, in 1818, A. B. had no legal estate to convey. *Doe d. Oliver v. Powell*, 1 Ad. & E. 531. But where A., without title, entered upon land and built a cottage, and afterwards accepted a lease by indenture from B.; and defendant claiming the land as his own, paid A. 20*l.* to give up possession to him; it was held, in ejectment by B., that A. had estopped himself from controverting the title of B., and that the defendant was bound by the estoppel, having come in under, and received possession from A. *Doe d. Bullen v. Mills*, 2 Ad. & E. 17; *Doe d. Huden v. Burton*, 9 C. & P. 254. See *Doe d. Johnson v. Baytap*, 3 Ad. & E. 188, and other cases cited *post*, p. 1008. So, an agreement to purchase by a party in possession is such an acknowledgment of title in the vendor as, in the event of the purchase not being completed, to estop the purchaser from denying the title of the vendor. *Doe d. Bord v. Burton*, 16 Q. B. 807. See *Furrelly v. Robins*, 1. R., 3 C. L.

284, C. P. *post*, p. 1010. So, where a bankrupt, by a conveyance which showed the legal estate to be outstanding, assigned leasehold premises to a trustee, and the assignees procured an assignment from the trustee to them, and forced the lessee to attorn to them, it was held that this was a sufficient title to enable the assignees to bring ejectment. *Cooper v. Lands*, 14 L. T. 287, E. T. 1866, C. P. And see further as to the effect of attornment, *Replevin*,—*Tenancy of plaintiff*, *post*, pp. 1082, 1083. Where A., who had no title to lands, granted or devised them to B. for life, with remainder to C.; it was held that B., having entered under the grant or devise, was estopped from denying A.'s title to make the grant or devise, and that neither B. nor his successors in title could acquire a title, as against C., under the Statute of Limitations. *Dalton v. Fitzgerald*, (1897) 2 Ch. 86, C. A., following *Board v. Board*, L. R., 9 Q. B. 48. *Secus* where A. a married woman, was freeholder of the land, and devised it without having power to do so. *In re Anderson*, (1905) 2 Ch. 70.

As already stated, *ante*, p. 340, a tenant may show that the title of the landlord has expired. Thus, in ejectment for a forfeiture, he may show that the plaintiff has conveyed away all his legal estate by way of mortgage, though the mortgagee has never enforced his rights. *Doe d. Marriott v. Edwards*, 5 B. & Ad. 1065. But, if the tenant continue to pay rent to the landlord after his title has expired, the creation of a new tenancy from year to year may be inferred, and this will estop the tenant. *L. & N. W. Ry. Co. v. West*, L. R., 2 C. P. 553. See further as to estoppel, *post*, *Action for recovery of land by landlord*, pp. 1006 *et seq.*

A lessee cannot before entry, maintain ejectment on the lease for the lands demised: for he has no estate, but only an *interesse termini*; Bac. Abr. Leases (M). See, however, *Doe d. Parsley v. Day*, 2 Q. B. 156; but the principle of this decision seems hardly to apply to the present practice. Where A. has leased land to B. for a term, and B. to C. for a less term, and B. surrenders his lease to A., yet B.'s term continues to the extent necessary to support C.'s term. Co. Litt. 338 b; *Mellor v. Watkins*, L. R., 9 Q. B. 400.

Title expired.] By the C. L. P. Act, 1852, s. 181, "In case the title of the claimant shall appear to have existed as alleged in the writ, and at the time of service thereof, but it shall also appear to have expired before the time of trial, the claimant shall, notwithstanding, be entitled to a verdict, according to the fact, that he was so entitled at the time of bringing the action and serving the writ, and to a judgment for his costs of suit." This section is repealed by 46 & 47 V. c. 49, but as an enactment was in accordance with the old practice; see Co. Litt. 285 a; *Doe d. Morgan v. Bluck*, 3 Camp. 447; the same practice would seem to be still in force. See Rules 1883, O. lxxii. r. 2, *ante*, p. 1, n. But plaintiff cannot sue out and serve a writ after the title has expired. *Doe d. Gardner v. Kennard*, 12 Q. B. 244. Where the claimant was assignee of lessee, and the defendant assignee of the sub-lessee of the same term, less ten days, who had held over after the expiration of his term, on which ejectment was brought before the expiration of the ten days, and the original term had expired before the trial, but there was no affirmative evidence that the claimant had no other title; it was held that the claimant was entitled to a verdict in the general form under C. L. P. Act, 1852, s. 180, and to a judgment and writ of possession under sect. 185. *Gibbins v. Buckland*, 1 H. & C. 736; 32 L. J., Ex. 156. See, however, the observations of Ld. Westbury, C., on this case in *Buckland v. Gibbins*, 32 L. J., Ch. 391.

The local description of the premises.] A variance in the local situation of the premises was held fatal, unless amended. *Goodtitle d. Pincent v.*

Lamminan, 2 Camp. 274. But the power of amendment at N. P. has rendered a variance of little moment, where the merits are not affected by it. *Vide ante*, p. 291.

Actual ouster—Ejection by tenants in common, &c.] Where the plaintiff is entitled with the defendant as joint tenant, tenant in common, or coparcener, he cannot maintain ejection, unless he has been actually ousted from his possession, or the defendant has done that which is equivalent to ouster. See *Culley v. Doe d. Taylerson*, 11 Ad. & E. 1008, 1015; *Oates d. Wigfall v. Brydon*, 3 Burr. 1897, and cases *infra*. It seems that the plaintiff must, in such case, state in the statement of claim that he is joint-tenant, &c., and has been ousted, and this ouster, if denied, will be an issue to be tried in the action. The C. L. P. Act, 1852, ss. 188, 189, relating to this subject, were repealed by 46 & 47 V. c. 49.

Where a tenant in common had been in the sole and uninterrupted possession for 36 years, without account to, or demand by, his companion, this was held to be ground for a jury to presume an actual ouster. *Doe d. Fisher v. Prosser*, Cowp. 217. If one tenant in possession claim the whole and deny possession to the other, this, being beyond the mere act of receiving the whole rent, is evidence of an ouster. *Doe d. Hellings v. Bird*, 11 East, 49; Co. Litt. 199 b. So, where three of four co-tenants authorized a company to use the land for a railroad, it was held that such user amounted to an ouster of the fourth tenant in common. *Doe d. Wawn v. Horn*, 3 M. & W. 333, 340; 5 M. & W. 564. Where one of two tenants in common of a wall altered the height of it and built an outhouse, of which the roof extended over it, and put up a tablet on the wall claiming the whole wall, it was held that this was evidence for the jury of an ouster of the co-tenant. *Stedman v. Smith*, 8 E. & B. 1; 26 L. J., Q. B. 314. Before the 3 & 4 W. 4, c. 27, a bare perception of the profits by one tenant in common for 26 years was no ouster. *Fairclain d. Empson v. Shackleton*, 5 Burr. 2604. And where one tenant in common levied a fine and took the rents and profits afterwards, without account, for nearly five years, it was held that there was no evidence from which a jury could presume (contrary to the justice of the case) an ouster of the other tenant. *Peacable d. Hornblower v. Read*, 1 East, 568.

Action for Recovery of Land by Landlord.

In an action by a landlord for the recovery of his land, the plaintiff in general need not prove his own title, but only the demise, and its expiration either by efflux of time, determination of will, demand of possession, notice to quit, disclaimer, or forfeiture.

The tenant in general cannot dispute the title of his lessor; *Delancy v. Fox*, 2 C. B., N. S. 768; 26 L. J., C. P. 248; whether the original lessor or his assignee be plaintiff. *Gouldsworth v. Knights*, 11 M. & W. 337; *Cuthbertson v. Irving*, 6 H. & N. 135; 29 L. J., Ex. 485, Ex. Ch. Therefore, if a demise be shown, and title be traced from the lessor to the plaintiff, no other evidence of title need be given. And, at any rate where the statement of claim alleges *generally* that the reversion is vested in the plaintiff, proof that the defendant has paid rent to himself, will be evidence of the plaintiff's title as assignee. *Doe d. Parker*, Peake, Ev., 5th ed. 283. Where the defendant, before the expiration of his term, has entered into an agreement for a renewal of his tenancy, from a person claiming as devisee of the landlord, and has paid him rent, he cannot dispute the title of the claimant by proving the incapacity of the deviser, if no fraud were practised on the defendant by the claimant. *Doe d. Marlow v. Wiggins*, 4 Q. B. 367. And a person claiming under, or who has received possession by the voluntary act of the tenant, is

equally estopped. *Doe d. Bullen v. Mills*, *ante*, p. 1004; *L. & N. W. Ry. Co. v. West*, L. R., 2 C. P. 553. And it seems that the estoppel will continue so long as the tenant, or any person claiming under him, retains possession of the land after the expiration of the lease. See *Doe d. Manton v. Austin*, *infra*. But a payment or acknowledgment made under the influence of a fraudulent or false representation will not estop the tenant. *Doe d. Plevin v. Brown*, 7 Ad. & E. 447.

It is in general unnecessary for the plaintiff to show how the defendant obtained possession of the land, for any person entering into possession, after entry of the tenant, and during the continuance of the term, is bound by the conditions of the lease. *Humphry v. Dunion*, Cro. Jac. 300; *Magdalen Hospital v. Knotts*, 8 Ch. D. 709, C. A. Entry of the tenant under the lease will be presumed. S. C. And in the absence of proof to the contrary, the person in possession is presumed to be assignee of the term. S. C.; *Doe d. Morris v. Williams*, 6 B. & C. 41. Proof of payment of rent to the plaintiff or his predecessor in title, by a previous occupier then in possession, is admissible evidence of the plaintiff's title, as against any subsequent tenant in possession, whether claiming through or under such occupier or not; for such receipt of rent is *prima facie* proof of a seisin in fee. *Vide ante*, p. 999; *Doe d. Lichfield v. Stacey*, 6 C. & P. 139; *Doe d. Manton v. Austin*, 9 Bing. 41; *Doe d. Spencer, El. v. Beckett*, 4 Q. B. 601; *Dainty v. Brocklehurst*, 3 Exch. 207. So the admissions of deceased occupiers are evidence of the plaintiff's title. *Vide ante*, p. 56.

But, if a defect of title in the lessor appear on the lease itself, the lessee is not estopped from showing that defect. *Doe d. Barker v. Goldsmith*, 2 C. & J. 671; *Greenaway v. Hart*, 14 C. B. 340; 23 L. J., C. P. 115; *Saunders v. Merryweather*, 3 H. & C. 902; 35 L. J., Ex. 115. Where, however, the defendant was lessee to the plaintiff, and had paid rent under his lease, which contained in the *habendum* a proviso that it was subject to an outstanding lease to W. K., it was held, that the defendant could not set up the term created by this latter lease against the plaintiff. *Duke v. Ashby*, 7 H. & N. 600; 31 L. J., Ex. 168.

The doctrine of estoppel has been applied also to encroachments made by the tenant during the term, whether for life or years, out of land belonging to a stranger, either adjoining the land held by the tenant, or separated from it by a road or brook; but the principle is scarcely that of an estoppel, but rather proceeds on the ground that if the power to encroach is derived from the occupation of premises held of a landlord, and the encroachment is occupied as if it were part of the holding, the presumption is that it is included in the tenancy and belongs to the landlord. *Doe d. Lloyd v. Jones*, 15 M. & W. 580; *Andrews v. Hailes*, 2 E. & B. 349; 22 L. J., Q. B. 409; *Doe d. Croft v. Tidbury*, 14 C. D. 304; 23 L. J., C. P. 57; *Lisburne, El. v. Davies*, L. R., 1 C. P. 259. See also *Whitmore v. Humphries*, L. R., 7 C. P. 1, cited *post*, p. 1074. But this presumption is one of fact only, and may be rebutted by clear evidence that, at the time the encroachment was made, the tenant intended it for himself. See S. CC. Thus, where A. occupied, as his own land, land belonging to B., and before the expiration of 12 (formerly 20) years became tenant to B. of land adjacent to the plot so occupied, this does not change the character of A.'s possession, but he can, whilst he remains such tenant, acquire against B. a prescriptive title to the land first occupied by him. *Dixon v. Baty*, L. R., 1 Ex. 259. See also *Berney v. Bickmore*, 8 L. T. 353, E. T. 1863, Q. B.

A mere licensee is on the same footing as a tenant; therefore where a person fraudulently obtained leave to enter, from a servant of the plaintiff, and then set up a title to the premises, it was held that he could not defend

an ejectment, but was bound to deliver up possession before he disputed the title. *Doe d. Johnson v. Baytop*, 3 Ad. & E. 188. Where A. conveyed lands in fee with an agreement that he was to remain in possession during his life; it was held, that A.'s widow could not defend her possession against an ejectment at the suit of the alienee by setting up the title of a party to whom A. had previously mortgaged the land. *Doe d. Laming v. Skirrow*, 7 Ad. & E. 157. The lessor of the plaintiff was devisee of A., and it appeared that A. let the defendant into possession, but was then occupier himself as servant only, or at most tenant at sufferance, to another; still it was held that this was sufficient title as against the defendant. *Doe d. Willis v. Birchmore*, 9 Ad. & E. 662. In *Doe d. Higginbotham v. Barton*, 11 Ad. & E. 307, it was held that the defendant might show that the plaintiff, his lessor, was mortgagor in possession with the mortgagee's assent, when he let the defendant into possession, and that the mortgagor had since been treated by the mortgagee as a trespasser, whereby his title had been determined. For this purpose evidence to show that the mortgagee had given notice to the defendant to pay the rent to him, and that the defendant had paid it, was held admissible; and *semble*, if communication were shown to have taken place between the mortgagee and the mortgagor, would have been sufficient proof that the mortgagor had been treated as a trespasser. This case has, however, been questioned; see *per* Williams, J., in *Delaney v. Fox*, 2 C. B., N. S. 777; 26 L. J., C. P. 250, where the court held that payment of rent under a threat of distress to a third person, who in fact was the real owner, was not a constructive eviction, so as to open the estoppel; and *quære*, whether there could be for this purpose a constructive eviction. S. C. A payment of rent under a mistake to a person, other than the person by whom the possession was given, is no estoppel. *Doe d. Higginbotham v. Barton*, *supra*. See further, *Action for use and occupation*, *ante*, pp. 333 *et seq.*, and *Action of replevin—Tenancy of plaintiff*, *post*, pp. 1082 *et seq.*

An estoppel must be mutual, and if the landlord is not estopped neither is the tenant. *Breerton v. Evans*, Cro. Eliz. 700; *Howe v. Scarrot*, 4 H. & N. 723; 28 L. J., Ex. 325; cited *ante*, p. 334.

A lessor cannot avoid a lease on the ground that he was induced to grant it by a fraudulent misrepresentation. *Feret v. Hill*, 15 C. B. 207; 23 L. J., C. P. 185.

Formerly the effect of the merger or surrender of a lease, out of which an underlease had been carved, was to destroy the conditions of the underlease. *Webb v. Russell*, 3 T. R. 393. It is now, however, provided by the Real Property Act, 1845, 8 & 9 V. c. 106, s. 9:—"That when the reversion expectant on a lease, made either before or after the passing of this Act, of any tenements or hereditaments, of any tenure, shall, after the said 1st October, 1845, be surrendered or merged, the estate which shall for the time being confer, as against the tenant under the same lease, the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease."

By J. Act, 1873, s. 25 (4), "There shall not, after the commencement of this Act" (1st Nov. 1875, see 37 & 38 V. c. 83), "be any merger by operation of law only, of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity." See *Thellusson v. Liddard*, (1900) 2 Ch. 635; *Capital & Counties Bank v. Rhodes*, (1903) 1 Ch. 631, C. A. *Id.* s. 25 (5), *ante*, p. 307, does not give a mortgagor in possession of land subject to a lease, the right to re-enter for breach of the covenants in the lease. *Matthews v. Usher*, (1900) 2 K. B. 535, C. A.

Proof of the tenancy.] If there is a demise by deed or in writing, it must be proved (unless admitted) by the production of the original lease or of the counterpart. *Roe d. West v. Davis*, 7 East, 363. If in the defendant's possession, notice to produce it should be given; but, the counterpart is good evidence without notice to produce the lease. *S. C.* See also *Magdalen Hospital v. Knotts*, 8 Ch. D. 709, C. A. Where the lease is oral, it may be proved by a person who was present at the making, or by an admission of the defendant. 2 Phillipps, Ev. 7th ed. 270. And though the terms of the lease have been committed to writing, yet if not signed by the parties, they may be proved by oral evidence. *R. v. S. Martin's, Leicester*, 2 Ad. & E. 210; see also, *ante*, pp. 3, 4. And the terms of a lease in writing may be proved by oral admissions of the opposite party. *Howard v. Smith*, 3 M. & Gr. 254; and see *Slatterie v. Pooley*, 6 M. & W. 664, *ante*, p. 3. In an action for mesne profits, the defendant was proved to be tenant in possession, by evidence of a lease granted to him, but not produced, and that he had paid a certain yearly rent. *Pearse v. Coaker*, L. R., 4 Ex. 92.

Tenancy at will—Demand of possession.] Where a party has been let into possession, pending a treaty for a purchase or a lease; *Right v. Beard*, 13 East, 210; or, under a void or imperfect lease or conveyance; Litt. s. 70; *Denn v. Fearnside*, 1 Wils. 176; *Doe d. Milburn v. Edgar*, 2 N. C. 498; and see 2 Smith's L. C., 11th ed. 120; or where, having been tenant for a term which has expired, he continues in possession negotiating for a new one; *Doe d. Hollingsworth v. Stennett*, 2 Esp. 717; in these and the like cases the party is either strictly tenant at will, or, at all events, is in lawful possession, and cannot be ejected until such possession is determined by demand of possession, breaking off the treaty, or other determination of the will. *Denn d. Brune v. Rawlins*, 10 East, 261; *Doe d. Newby v. Jackson*, 1 B. & C. 448. And, the demand must be made before the date of the writ. *Goodtitle d. Gallaway v. Herbert*, 4 T. R. 680. The principle of these cases is, that it is not "the agreement, but the letting into possession, that creates the tenancy; for the person suffered so to occupy, cannot, on the one hand, be considered as a trespasser when he enters, and on the other hand cannot have more than the interest of a tenant at will, the lowest estate known to the law;" *per Curiam* in *Doe d. Gray v. Stanton*, 1 M. & W. 700. A *cestui que trust* (if in actual occupation; *Melling v. Leak*, 16 C. B. 652; 24 L. J., C. P. 187), is, at law, tenant at will to his trustee; *Garrard v. Tuck*, 8 C. B. 221; except for the purpose of the statutes of limitation. See 3 & 4 W. 4, c. 27, s. 7, *post*, p. 1066; and see *post*, p. 1072.

Where a tenancy at will is created, any act inconsistent with a tenancy at will, done by either party, will amount to a determination of the will, and render unnecessary a formal demand of possession; thus a threat made to the tenant by the agent of the lessor "to take measures to recover possession" is sufficient. *Doe d. Price v. Price*, 9 Bing. 356. So, a feoffment by the lessor to another, with livery of seisin made on the land, though in the absence of the tenant, determined the will. *Ball v. Cullimore*, 2 C. M. & R. 120. So the granting of a lease, though invalid, by parish officers to A., who thereupon takes possession, is a determination of a previous tenancy at will of B. *Wallis v. Delmar*, 29 L. J., Ex. 276. An entry by the landlord, and the exercise of an act of ownership, which would otherwise have amounted to a trespass, determines the estate at will, whether done with the intention of determining it or not. *Turner v. Doe d. Bennett*, 9 M. & W. 643. An assignment by a tenant at will is a determination of the will. Co. Litt. 57 a.; *Shaw v. Barbor*, Cro. Eliz.

830. See *Birch v. Wright*, 1 T. R. 382. So, where a purchaser, let into possession, refuses to complete the purchase and assigns his interest, the assignment is a determination of the will without demand. *Doe v. Abbot*, Winton Sum. Ass. 1838, *per* Parke, B. But, an assignment, or other act by the tenant, in order to be a determination of the will, as *against* the landlord, must be known to the landlord. *Pinhorn v. Souster*, 8 Exch. 763; 22 L. J., Ex. 266. If the landlord became insolvent, the vesting order, with knowledge of it by the tenant, determined the tenancy. *Doe d. Davis v. Thomas*, 6 Exch. 854; 20 L. J., Ex. 367. Hence, it would seem that if the landlord become bankrupt, knowledge of the adjudication will also determine a tenancy at will.

Where the vendor of a term, before all the purchase-money was paid, agreed with the vendee that he should have possession of the premises till a given day, paying the reserved rent in the meantime, and that, in case he did not pay the residue of the purchase-money on that day, he should forfeit the portion he had already paid and not be entitled to an assignment of the lease, *Ld. Ellenborough* held that this agreement operated like a clause of re-entry on a breach of covenant in a lease, and that, the residue of the purchase-money not being paid on the appointed day, the vendee's interest thereupon ceased, and he might be ejected without any notice. *Doe d. Leeson v. Sayer*, 3 Camp. 8. And if a third person, under such circumstances, has come in as a tenant to the vendee, though with the vendor's knowledge, ejectment may be maintained against him also without notice. *Doe d. Parker v. Boulton*, 6 M. & S. 148. So, a lease by the vendor under such circumstances determines the will; and the lessee is not estopped by having received possession from the vendor's wife who had been put into the premises as caretaker by the vendee: the husband and wife being the vendors. *Farrelly v. Robins*, 1 R., 3 C. L. 284, C. P. So, where a man got into possession of a house without the privity of the landlord, and the parties afterwards entered into a negotiation for a lease, but disagreed about the value of the fixtures, *Ld. Ellenborough* was of opinion that if this was a tenancy of any sort it was a tenancy at sufferance, and that a notice to quit was unnecessary. *Doe d. Knight v. Quigley*, 2 Camp. 505; and see *Doe d. Moore v. Lawder*, 1 Stark. 308; *Doe d. Rogers v. Pullen*, 2 N. C. 749.

A demand of possession may be made upon the wife of the tenant at will on the premises. *Doe d. Blair v. Street*, 2 Ad. & E. 329.

As to the case of mortgagee and mortgagor, see *Action for recovery of land by mortgagee*, *post*, p. 1057.

Proof of tenancy from year to year.] Evidence of a demise from year to year may, in the absence of other proof, be gathered from the payment and receipt of yearly rent. *Doe d. Wawn v. Horn*, 3 M. & W. 339. Where payment of rent is the only proof of tenancy, defendant may show that the plaintiff received it as agent for another. *Doe d. Harvey v. Francis*, 2 M. & Rob. 57. The receipt of rent is only evidence of such a tenancy, and this may be rebutted, as by showing that the plaintiff received it as due on a lease, the expiration of which had been concealed from him by the defendant; *Doe d. Lord v. Crago*, 6 C. B. 90; or that the plaintiff had received it on a void lease under the mistaken notion that he could confirm it. *Smith v. Willlake*, 3 C. P. D. 10, C. A. If a party, having a lease void by the Statute of Frauds; *Doe d. Rigge v. Bell*, 5 T. B. 471; or, by 8 & 9 V. c. 106, s. 3; *Truss v. Savage*, 4 E. & B. 36; 23 L. J., Q. B. 339; *Lee v. Smith*, 9 Exch. 662; 23 L. J., Ex. 198; or, an agreement for a lease; *Arden v. Sullivan*, 14 Q. B. 832; *Mann v. Lorejoy*, Ry. & M. 355; *Doe d. Tilt v. Stratton*, 4 Bing. 446; *Braythwayte v. Hitchcock*, 10 M. & W. 494; enter into possession and pay rent at so much a year, the jury may conclude that

he entered under a parol demise from year to year on such of the terms of the void lease, or of the agreement, as were not inconsistent with such a holding. See notes to *Doe d. Rigge v. Bell* and *Clayton v. Blakey*, 2 Smith's L. C. So if, being in possession, he acknowledged that half a year's rent, at so much, is due; *Cox v. Bent*, 5 Bing. 185; but, if the acknowledgment be not of some certain sum, it may be an admission of a tenancy, but it is no evidence of a tenancy from year to year. See *Reguart v. Porter*, 7 Bing. 451. So, too, where a tenant holds over after the determination of his term, and pays rent, the presumption is that he holds as tenant from year to year on the terms of the expired lease, so far as they are applicable to a tenancy from year to year; and this, too, though the rent be increased by agreement. *Digby v. Atkinson*, 4 Camp. 275; *Hayatt v. Griffiths*, 17 Q. B. 505. Hence, if the lease contained, or by the agreement was to contain, a clause of re-entry, for breach of a husbandry covenant; *Doe d. Thomson v. Amey*, 12 Ad. & E. 476; or, for non-payment of rent; *Thomas v. Packer*, 1 H. & N. 669; 26 L. J., Ex. 207; the yearly tenancy will be subject to a similar condition. So, if the tenant has entered and paid rent under an agreement for a lease for seven years; *Doe d. Tilt v. Stratton*, ante, p. 1010; or, under a lease void at law as being for more than three years and not under seal; *Doe d. Duenish v. Moffat*, 15 Q. B. 257; 19 L. J., Q. B. 438; *Tress v. Savage*, ante, p. 1010; and has occupied during the whole period, the tenancy ceases by effluxion of time; an agreement that it should cease at the end of seven years not being inconsistent with a tenancy from year to year. See also *Martin v. Smith*, L. R., 9 Ex. 50, ante, p. 347. The presumption as to the terms of holding is in all these cases one of fact, and not of law; *Hayatt v. Griffiths*, supra; though it would seem that where rent is paid, it is a conclusion of law that some tenancy is created. *Bishop v. Howard*, 2 B. & C. 100. Where the yearly tenant of glebe lands remained in possession for eight months after the death of the incumbent, to whom he was tenant, it was held that, after such a lapse of time, it might be presumed that the new incumbent had assented to the continuance of the tenancy on the same terms as before and that a notice to quit was necessary. *Doe d. Cules v. Somerville*, 6 B. & C. 126.

Where a tenant for life had granted a lease under a power to A., but the lease was void against the remainderman B., the receipt of rent by B. from A. could not, at common law, confirm the lease, but it created a yearly tenancy between A. and B. *Doe d. Martin v. Watts*, 7 T. R. 83; see also *post*, pp. 1016, 1017. Now, by 13 & 14 V. c. 17, s. 2 (replacing 12 & 13 V. c. 26, s. 3), whereupon or before the acceptance of rent under any such invalid lease, any receipt, memorandum, or note in writing, confirming such lease is signed by the person accepting such rent, or his agent for that purpose, the acceptance shall confirm the lease, as against him.

The same presumptions are to be made where a corporation is either landlord or tenant, and the demise is void by reason of its not being under seal. *Ecclesiastical Commissioners v. Merril*, L. R., 4 Ex. 162; following *Wood v. Tate*, 2 N. R. 247; see also *Doe d. Pennington v. Tanriere*, 12 Q. B. 998. The case of *Finlay v. Bristol & Exeter Ry. Co.*, 7 Exch. 409; 21 L. J., Ex. 117, is opposed to this view, but the authority of this case has been impugned; and many of the cases on which it was decided were overruled by *S. of Ireland Colliery Co. v. Waddle*, L. R., 3 C. P. 463; L. R., 4 C. P. 617, Ex. Ch. See further, *sub tit. Actions by and against Companies—Contracts by Corporations*, *post*, pp. 1091 *et seq.*

A letting, so long as both parties please, without any reservation or payment of annual rent, makes a tenancy at will. *Richardson v. Langridge*, 4 Taunt. 128. So, a letting by deed, expressly "at will," at the rate of so much per annum payable quarterly, is not converted into a yearly tenancy by payment of the annual rent. *Doe d. Bastow v. Cox*, 11 Q. B. 122. By

holding premises for several weeks, paying rent weekly, a tenancy from week to week is created. *Jones v. Mills*, 10 C. B., N. S. 788; 31 L. J., C. P. 66, *post*, p. 1016. A parol demise from year to year, created by the owner in fee, is not determined by his death, or by that of a subsequent tenant for life, claiming under him. *Cattley v. Arnold*, 1 J. & H. 651. The interest of a tenant from year to year is a chattel interest which passes to his personal representative. *Muckay v. Mackreth*, 4 Doug. 213, cited 3 T. R. 13; *Doe d. Shore v. Porter*, 3 T. R. 13; *Doe d. Hull v. Wood*, 14 M. & W. 682. Where premises are let at a yearly rent, on the terms that the landlord shall not turn out the tenant or raise the rent so long as it is regularly paid, this amounted at law to a tenancy from year to year, at most; *Doe d. Warner v. Browne*, 8 East, 166; but on equitable principles, the tenant has now a right to retain possession, during his life, for as long as the landlord's interest continues. *Kusel v. Watson*, 11 Ch. D. 129, C. A. Where, however, the agreement contained a further clause that the tenancy should last so long as the lessor had power to let the premises, it was held to create a tenancy from year to year only. *Wood v. Beard*, 2 Ex. D. 30. *Sed quare*.

[*Lease, or agreement for a lease.*] A question frequently occurs whether the instrument produced operates as an actual demise, or is merely an agreement to demise. The intention of the parties, as declared by the words of the instrument, must govern the construction. Upon a review of the cases, it seems that words of present demise, as, "I demise,"—or words conferring a right of enjoyment, as that the party "shall hold and enjoy,"—are evidence of an intention to make an actual lease. *Harrington v. Wise*, Cro. Eliz. 486; *Baxter v. Browne*, 2 W. Bl. 973; *Poole v. Bentley*, 12 East, 168; *Barry v. Nugent*, cited 5 T. R. 165. The word *agree* will not of itself exclude the inference of a present demise, where there is nothing else to show that such a demise was not intended. *Per Tindal, C.J., Staniforth v. Fox*, 7 Bing. 592; *Haul v. Hall*, 2 Ex. D. 355, C. A. Where, on the face of the instrument, it was evident that a future lease was contemplated, though not expressly provided for, and at the same time various terms of the tenancy remained to be ascertained, though there were words of present demise, the instrument was held to operate as an agreement only. *Morgan d. Dowding v. Bissell*, 3 Taunt. 65. But in *Doe d. Phillip v. Benjamin*, 9 Ad. & E. 644, a stipulation for a future lease "on the usual terms," was held compatible with an intent to make a present demise. See also *Curling v. Mills*, 6 M. & Gr. 173; *Poole v. Bentley*, *supra*. A landlord and tenant, between whom there was a subsisting tenancy, agreed in writing for the letting of the farm upon different terms, the amount of the rent to be settled by valuation, and the tenant to find sureties for his paying the rent. The amount was not settled, and the sureties were not given: held, that the instrument, though it contained words of present demise, did not operate as a lease, or alter the terms of the existing tenancy. *John v. Jenkins*, 1 Cr. & M. 227. But, if the terms of the lease are ascertained by the agreement and there are words of present demise, it will operate as a lease. *Doe d. Pearson v. Ries*, 8 Bing. 178. And, though the preparation of a future lease be provided for, yet if it be agreed that in the meantime the lessee shall enter and pay the stipulated rent, &c., that amounts to a present demise. *Pienero v. Judson*, 6 Bing. 206; *Warman v. Faithfull*, 5 B. & Ad. 1042; *Pearce v. Cheslyn*, 4 Ad. & E. 225; *Anderson v. Midland Ry. Co.*, 3 E. & E. 614; 30 L. J., Q. B. 94. Again, where it is stipulated that the lessee shall do some act upon the premises before the execution of a formal lease, this has been considered as evidence of a present demise. *Poole v. Bentley*, 12 East, 168. And, a stipulation that the agreement shall be considered binding until one fully prepared can be produced, is evidence of the same intent. S. C. *Doe d. Walker v. Groves*,

15 East, 244. On the other hand, if a forfeiture would be incurred by holding the instrument to be a lease, it is to be presumed that the intention of the parties was to make an agreement only. *Doe d. Choe v. Clare*, 2 T. R. 739. And, any words which show that a future act is to be done before the relation of landlord and tenant commences (as the purchase and addition of another piece of land to the premises) are ground for holding that the instrument was not intended to operate as a lease. *Doe d. Jackson v. Ashburner*, 5 T. R. 163. And see *Gore v. Lloyd*, 12 M. & W. 463; *Doe d. Wood v. Clarke*, 7 Q. B. 211. So, where a stipulation is contained in the instrument, importing that something ulterior to the agreement is to be done by way of a regular lease, this is evidence of an agreement merely. *Doe d. Bromfield v. Smith*, 6 East, 530; *Rawson v. Eicke*, 7 Ad. & E. 451. And, an express stipulation for a power of distress, until the lease is granted, does not necessarily make the instrument operate as a present demise. *Bicknell v. Hood*, 5 M. & W. 104. If the party who agrees to demise, appear on the face of the agreement to have no present power to lease, it will not be construed to be a present demise. *Hayward v. Haswell*, 6 Ad. & E. 265. And see *Doe d. Bailey v. Foster*, 3 C. B. 215. The inference of a present demise may be prevented by an express provision that the agreement shall not operate as such. *Perring v. Brook*, 1 M. & Rob. 510.

An actual demise may be created by letters interchanged between lessor and lessee. *Chapman v. Bluck*, 4 N. C. 187. But, as in other cases, where the agreement was to be collected from mutual letters, which left some of the terms for future settlement, and contained no provision for possession before the date of the future lease, it was held that there was no present demise. *Jones v. Reynolds*, 1 Q. B. 506. See further, *ante*, pp. 314 *et seq.*

The law is well settled, that where there is any doubt as to the operation of the contract, the court must endeavour to discover the intention of the parties from the contents of the instrument; and if they see a paramount intention that the instrument shall operate as a lease, they must hold it to be such, although it may contain conflicting expressions. *Per Tindal, C.J., Pinero v. Judson*, 6 Bing. 210. And, in forming its judgment, the court will consider the nature of the property, and look at the instrument in connection with surrounding circumstances, but will not regard subsequent acts of the parties. *Doe d. Morgan v. Powell*, 7 M. & Gr. 980, 988, 992. The marginal note of the last case also excludes "extrinsic circumstances," but the report itself does not bear this out. In *Chapman v. Bluck*, *supra*, it was said that subsequent acts of the parties were admissible to show their intention. See further, *ante*, pp. 20, 29 *et seq.*, as to the admissibility of oral evidence.

By the Real Property Act, 1845 (8 & 9 V. c. 106, s. 3), a lease for which, before 1st October, 1845, a writing was required, is, if made since that date, void at law, unless made by deed. The Stat. of Frauds, which is referred to in the above enactment, by sects. 1, 2, requires a writing for every lease, except leases not exceeding the term of three years from the making, on which the reserved rent is at least two-thirds of the improved value of the premises. A lease which does not conform to the Stat. of Frauds, has, by that Act, only the force of a lease at will, as to which *vide ante*, p. 1009.

Since the 8 & 9 V. c. 106, the same construction must be put on an instrument as before the Act; and it will depend upon the terms used whether or not it amounts to a lease; *Stratton v. Pettit*, 16 C. B. 420; 24 L. J., C. P. 182; but the instrument, though void as a lease, may be good as an agreement for a lease for years; *Bond v. Rosling*, 1 B. & S. 371; 30 L. J., Q. B. 227; *Parker v. Taswell*, 2 De G. & J. 559; 27 L. J., Ch. 812; and see *Rollason v. Leon*, 7 H. & N. 73; 31 L. J., Ex. 96; *Tidey v. Mollott*,

16 C. B., N. S. 298; 33 L. J., C. P. 235, or for life; *Zimble v. Abrahams*, (1903) 1 K. B. 573, C. A. And, where a person had entered into possession, and paid rent under an instrument that is void as a lease, not being by deed, the instrument may be used as an agreement to show on what terms he holds as a tenant from year to year. *Tress v. Savage*, 4 E. & B. 36; 23 L. J., Q. B. 339. See further, *ante*, pp. 1010, 1011. And since the J. Acts, "a tenant holding under an agreement for a lease, of which specific performance would be decreed, stands in the same position as if the lease had been granted." *Lowther v. Heaver*, 41 Ch. D. 248, 264, C. A.; following *Walsh v. Lonsdale* 21 Ch. D. 9, 14, 15, *per* Jessel, M.R. See *Zimble v. Abrahams*, *supra*. See also *Swain v. Ayres*, *post*, p. 1029; and 2 Smith's L. C., 11th ed. 121 *et seq.*, and *post*, p. 1082.

An agreement for a lease may therefore now sometimes be relied on as an equitable defence. *Vide post*, p. 1062.

Tenancy, when determinable.] A demise from year to year, so long as both parties please, is determinable at the end of the first year, and therefore if a tenant hold over after the end of his term, and pay rent, the yearly tenancy may be determined at the end of the first year; *Doe d. Clarke v. Smaridge*, 7 Q. B. 957; but a demise, "not for one year only, but from year to year," has been held to constitute a tenancy for two years at least. *Denn d. Jacklin v. Cartright*, 4 East, 29. So, a demise "for a year, and afterwards from year to year;" *Belaysse v. Burbridge*, Lut. 213; and see 1 T. R. 380; although there be a stipulation for less than a half year's notice to quit. *Doe d. Chadborn v. Green*, 9 Ad. & E. 658. But, where the demise was "for 12 months certain, and six months' notice afterwards," Ld. Ellenborough held that the tenant was at liberty to quit at the end of 12 months, giving six months' previous notice. *Thompson v. Maberley*, 2 Camp. 573. And this decision, as explained in *Doe d. Chadborn v. Green*, *supra*, was recognized in *Brown v. Symons*, 8 C. B., N. S. 208; 29 L. J., C. P. 251; and applied to a contract, in similar terms, as to service. A lease for six months, and "so on for six months to six months, giving six calendar months' notice," is a demise for a year at least. *R. v. Chawton*, 1 Q. B. 247. So, a demise for three years, "determinable on a six months' previous notice to quit, otherwise to continue from year to year, until the term shall cease by notice to quit at the usual times," is a demise for three years certain, and cannot be determined sooner than by a notice ending with the third year. *Jones v. Nixon*, 1 H. & C. 48; 31 L. J., Ex. 505. An agreement of tenancy "at an inclusive rent of 25*l.* per annum, tenant to pay rates and taxes in addition; three months' notice on either side," is a yearly tenancy. *Dixon v. Bradford, &c. Supply Soc.*, (1904) 1 K. B. 444; *Lewis v. Baker*, (1905) 2 K. B. 576; (1906) 2 K. B. 599, C. A. An agreement by which land was let for a market garden at the "rent of 19*l.* 12*s.* a year, payable quarterly on the four usual quarter-days for payment of rent in every year," with a proviso for determination of the tenancy "by either party giving to the other three calendar months' notice . . . on any day of the year," is a tenancy from year to year. *King v. Eversfield*, (1897) 2 Q. B. 475, C. A., overruling *dicta contra* in *Doe d. King v. Grafton*, cited *post*, p. 1016. See further, as to what constitutes a tenancy for a year, *R. v. Herstonceux*, 7 B. & C. 551; *R. v. S. Giles*, 4 B. & S. 509; 33 L. J., M. C. 3; *Hastings Union v. S. James, Clerkenwell*, L. R., 1 Q. B. 38. See also, *Notice to quit, at what time, infra*.

Notice to quit, when necessary.] In the ordinary case of a tenancy from year to year, in order to determine the tenancy, a notice to quit must be given; but where a person has entered under an agreement for a lease for seven years; *Doe d. Tilt v. Stratton*, 4 Bing. 446; or under an instrument

void as a lease, as being for more than three years and not under seal; *Doe d. Davenish v. Moffatt*, 15 Q. B. 257; *Tress v. Savage*, *ante*, p. 1010; and paid rent so as to create a tenancy from year to year, and has occupied *during the whole period* mentioned in the instrument, the tenancy ceases by the agreement of the parties, and no notice to quit is necessary to determine it. See also Maule's, J., judgment in *Berrey v. Lindley*, 3 M. & Gr. 514. Where tenant holds on under 14 & 15 V. c. 25, s. 1, *ante*, p. 336, to the expiration of the current year of tenancy, no notice to quit at its expiration is required. See also the cases cited *ante*, p. 1011.

Where premises belonging to one partner are let by him to his firm for partnership purposes, he is, on the dissolution of the partnership, entitled to recover the premises from the other members of the firm without any notice to quit. *Doe d. Colnaghi v. Bluck*, 8 C. & P. 464. And see *Doe d. Waithman v. Miles*, 1 Stark. 181; S. C., 8 C. & P. 468, n.; in which case the deed of partnership contained an express stipulation that the house should be occupied by the firm during the partnership only.

Notice to quit, how proved.] A notice to quit, if in writing, may be proved by a duplicate original, or an examined copy, without a notice to produce the original. *Doe d. Fleming v. Somerton*, 7 Q. B. 58; see *ante*, pp. 3, 14.

Notice to quit, at what time it must be given.] The notice to quit, in order to determine a tenancy from year to year, must be proved to have been given half a year (182 days: Co. Lit. 135 b; Dyer, 345 d; *semble*, 183 days in leap year) before the end of the current year of the tenancy; *Right d. Flower v. Darby*, 1 T. R. 159, 163; see also *Wilkinson v. Calvert*, *post*, p. 1015; except where the rent is payable on the usual quarterly feast days, when notice on one feast day to quit on the next but one is sufficient; *Roe d. Durant v. Doe*, *infra*; and necessary, although more than half a year's notice is thereby required. *Morgan v. Davies*, *infra*. See also Adams, Eject. 100; Cole, Eject. 48. Thus notice on Sept. 28th to quit on Mar. 25th ensuing; *Roe d. Durant v. Doe*, 6 Bing. 574; or on Dec. 25th to quit on June 24th; *Doe d. Buddle v. Lines*, *post*, p. 1017; is sufficient. But notice, on Mar. 26th, to quit on Sept. 29th ensuing, is insufficient. *Morgan v. Davies*, 3 C. P. D. 260. In the case of a tenancy within the Agricultural Holdings (England) Act, 1883 (46 & 47 V. c. 61), s. 33, "where a half year's notice, expiring with a year of tenancy is by law necessary and sufficient for determination of a tenancy from year to year," whether the contract of tenancy was made before or after the passing of the Act, a year's notice so expiring shall be necessary and sufficient, unless the landlord and tenant, by writing under their hands, agree that the section shall not apply, in which case a half-year's notice is sufficient; and the section does not "extend to a case where the tenant is adjudged bankrupt or has filed a petition for a composition or arrangement with his creditors." As to what tenancies are within the act, *vide* sects. 54, 61, *ante*, p. 893. Sect. 33 applies only to tenancies where a half-year's notice is required *by law*. *Barlow v. Teal*, 15 Q. B. D. 501, C. A. Thus, a tenancy to continue until six months' notice shall have been given in the usual way to determine the tenancy, is not within it. S. C., following *Wilkinson v. Calvert*, 3 C. P. D. 360. The period may be controlled by special agreement or local custom. *Roe d. Henderson v. Charnock*, Peake, 4; *Doe d. Dagget v. Snowden*, 2 W. Bl. 1225. The notice to determine a yearly tenancy must expire at the expiration of the current year, so that the tenant may go out on the anniversary of his entry; *Right d. Flower v. Darby*, 1 T. R. 159; *Doe d. Cornwall v. Matthews*, 11 C. B. 675; but it is also good if it expire *on* the anniversary of the commencement of the tenancy. *Sidebotham v. Holland*, (1895) 1 Q. B. 378, C. A. Where the

tenancy is for less than a year, as from three months to three months, the notice must expire at the end of such shorter period, or some future corresponding period, calculated from the day of commencement. *Kemp v. Derrett*, 3 Camp. 510. In such case the length of the notice must be regulated by the letting; as a month's notice, for a monthly letting, &c. *Doe d. Parry v. Hazell*, 1 Esp. 94. In *Jones v. Mills*, 10 C. B., N. S. 788; 31 L. J., C. P. 66, it was held that some reasonable notice to quit was necessary to determine a tenancy from week to week; Williams, J., being of opinion that a week's notice was necessary, citing *Kemp v. Derrett*, *supra*, and *Ld. Mansfield's* judgment in *Right d. Flower v. Darby*, 1 T. R. 162; Willes, J., inclining to think half a week's notice would be sufficient, citing Parke, B., in *Huffell v. Armistead*, 7 C. & P. 57; see Adams, Eject. 102. See also *Bowen v. Anderson*, (1894) 1 Q. B. 164, correcting the judgment in *Sandford v. Clarke*, 21 Q. B. D. 398. In *Harvey v. Copeland*, (1892) 30 L. R., 1r. 412, O'Brien and Gibson, JJ., held that a week's notice was necessary, but Johnson, J., that a reasonable notice was sufficient. On a letting from year to year, to quit at a quarter's notice, the notice must expire with the current year, unless otherwise expressly provided. *Doe d. Pitcher v. Donovan*, 1 Taunt. 555; 2 Camp. 78; *Dixon v. Bradford, &c. Supply Soc.*, and *Lewis v. Baker*, *ante*, p. 1014. But, a letting at a yearly rent, payable quarterly, to hold until one party shall give the other six calendar months' notice to quit, may be determined by such notice ending on any of the quarter-days. *Doe d. King v. Grafton*, 88 Q. B. 496; 21 L. J., Q. B. 276. A tenancy which began on May 1, under an agreement which provided that the rent should be payable on May 1, Aug. 1, Nov. 1, and Feb. 1, "subject to three months' notice on either side to terminate this agreement," is determinable by three months' notice expiring on any day. *Soames v. Nicholson*, (1902) 1 K. B. 157. In such cases the notice is to be computed exclusively of the day of the notice. *Quartermaine v. Selby*, 5 T. L. R. 223, C. A., 26 Jan. 1889. Where a lease required six months' notice to quit to be given, it was held that in the absence of a custom to show that calendar months were meant, a six lunar months' notice was good. *Rogers v. Hull Dock Co.*, 34 L. J., Ch. 164, 165, Wood, V.-C., *vide ante*, p. 18.

The tenancy will be taken *prima facie* to commence from the day of the tenant's entry, and not with reference to any particular quarter-day. *Kemp v. Derrett*, *supra*; see *Sidebotham v. Holland*, *infra*. But, where a tenant entered in the middle of a quarter, and afterwards paid for that half-quarter, and thenceforth paid from quarter to quarter, he was held to be a tenant from the first quarter-day. *Doe d. Holcomb v. Johnson*, 6 Esp. 10; *Doe d. Savage v. Stapleton*, 3 C. & P. 275. So where the tenant entered under an agreement dated Dec. 20, which provided that the first quarterly payment of rent should be on Mar. 25, but named no time for the commencement of the tenancy. *Sandill v. Franklin*, L. R., 10 C. P. 377. In another case, where the tenant entered in the middle of a quarter, upon an agreement "to pay rent quarterly, and for the half-quarter," it was left to the jury to say whether the party was tenant from the quarter-day *prior* to the time when he entered, or from the *succeeding* quarter-day. *Doe d. Wadmore v. Selwyn*, Adams, Eject. 107. But where a lease expresses that the term commences "at," "on," "from," or "on and from" a certain day, that day is the first day of the term, even though an apportioned rent is to be paid up to the usual quarter-day. *Sidebotham v. Holland*, (1895) 1 Q. B. 378, C. A. Where a tenant for life granted a lease for years, void as against the remainderman, to commence on one of the usual quarter-days, and died during the term in the middle of a quarter, and the remainderman received rent from the tenant for two years at the quarter-days mentioned in the demise; it was held that this was evidence on which a jury *ought* to find

that there was an agreement that the tenant should continue to hold as tenant from year to year as from the day of the commencement of the original demise; and that a notice to quit on that day was therefore good. *Roe d. Jordan v. Ward*, 1 H. Bl. 97; *accord. Doe d. Collins v. Weller*, 7 T. R. 478. So, where a yearly tenant, under a lessee for years, remains in possession after the expiration of the lease, paying rent to the reversioner, his tenancy has reference to the period of his original entry, the lease having expired in the middle of a current year of that tenancy. *Kelly v. Patterson*, L. R., 9 C. P. 681. So, where a tenant from year to year lets in another in his place, from whom the landlord receives rent as before, the year of the tenancy of the second tenant runs from the commencement of the original tenancy, and not from the time he entered. *Doe d. Castleton v. Samuel*, 5 Esp. 173. A. held premises of B. as tenant for a year, and so on from year to year, the tenancy commencing at Christmas. A. having died in June, his widow, by agreement with B., continued to occupy the premises at the same rent, nothing being said about the commencement of her tenancy, and so occupied for some years; it was held, that there was evidence enough to warrant the jury in assuming that the widow's tenancy was a mere continuation of the original tenancy of A., and therefore properly determined by a notice expiring at Christmas. *Humphreys v. Franks*, 18 C. B. 323. Where there was a demise for one year and six months certain, from Aug. 13th, 1838, at a yearly rent, to be paid quarterly, the first payment to be on Sept. 29th next, with a proportionate abatement to the tenant, three months' notice to be given previous to the determination of the tenancy; and the tenant continued to occupy beyond the year and six months, it was held that the tenancy could be determined by a three months' notice, expiring the 13th August, 1840. *Doe d. Robinson v. Dobell*, 1 Q. B. 806. See also *Berrey v. Lindley*, 3 M. & Gr. 498. But, where the lease was for 14 years and a half, which began at Christmas and ended at midsummer, and the assignee of the lessee held over and paid rent to the assignee of the lessor, the yearly tenancy was held to begin at the expiration of the previous lease. *Doe d. Buddle v. Lines*, 11 Q. B. 402. "This is not at variance with any of the cases. The original entry spoken of in them is the original entry of the lessee himself." S. C., *Id.* 405, *per Cur.* It has been said that these cases show that a yearly tenancy, created by holding over and payment of rent, runs as against the lessee himself from his original entry, and not from the determination of the previous term; but that the rule does not apply as against his assignee. *Kelly v. Patterson*, L. R., 9 C. P. 687, *per Brett, J.* It is, however, very doubtful how far this observation will reconcile all the cases above cited, many of which seem to have been determined on their own peculiar circumstances.

A lease made and dated in 1851, *habendum* for 14 years from Christmas 1849, with a proviso that the demise should be determinable by notice, at the end of the first seven years thereof, is determinable at Christmas, 1856. *Bird v. Baker*, 1 E. & E. 12; 28 L. J., Q. B. 7. Where a tenancy from year to year arises on payment of rent, by a tenant holding under a lease void by the Statute of Frauds, the void lease will regulate the time of the notice; thus the terms of an oral lease for seven years, being that the tenant should enter at Lady-day and quit at Candlemas, and the tenant having entered accordingly and paid rent, it was held that the tenancy could only be determined by a notice to quit at Candlemas. *Doe d. Rigge v. Bell*, 5 T. R. 471; and see *ante*, p. 1011.

A variation in the rent, agreed upon during the tenancy, does not alone make a new tenancy. *Doe d. Bedford v. Kendrick*, Adams, Eject. 107; *Doe d. Monck v. Gekkie*, 5 Q. B. 841.

Where the tenant enters upon different parts of the premises at different times, it is sufficient to give half a year's notice to quit, with reference to the

original time of entry on the *substantial part* of the premises demised. *Doe d. Dugget v. Snowdon*, 2 W. Bl. 1224; *Doe d. Strickland v. Spence*, 6 East, 120; *Doe d. Bradford Ld. v. Watkins*, 7 East, 551. And it seems, it is a question for the jury, which is the principal, and which the accessorial subject of demise. *Doe d. Heapy v. Howard*, 11 East, 498. But *quære*, whether the landlord can recover the whole, as from a day before the right of entry on the whole has accrued. *Doe d. Davenport v. Rhodes*, 11 M. & W. 600.

A holding from Michaelmas *primâ facie* signifies Michaelmas new style; as to when evidence is admissible to show that old Michaelmas is meant, see *ante*, p. 27. It may be observed that until the year 2100, old Lady-day falls on April 7th, and old Michaelmas-day on October 12th, as there were no intercalary days in February, 1800 or 1900. See 24 G. 2, c. 23, ss. 1—3; Tomlins' Law Dict., 3rd ed. *tit. Year*, and Encycl. Brit., 9th ed. *tit. Calendar*, p. 671.

A notice to quit is of course no evidence *per se* to prove the commencement of the tenancy; *Doe d. Ash v. Calvert*, 2 Camp. 388; but if a notice to quit be personally served upon the tenant, who reads it, or has it read to him, and does not object to it, his conduct amounts to an admission, and the notice is *primâ facie* evidence of the commencement of the tenancy, if a specific time for quitting be mentioned in it. *Thomas d. Jones v. Thomas*, *Id.* 648; *Doe d. Clarges v. Forster*, 13 East, 405. But at most, this is only *primâ facie* evidence for the jury, and may be rebutted by showing the period when the tenancy did in fact commence. *Oakapple d. Green v. Copous*, 4 T. R. 361. Where no specific time to quit was mentioned, but the notice was to quit "at the expiration of the current year," and a declaration in ejectment was served nearly a year afterwards, laying the demise half a year after the notice, and the tenant, on being served with the declaration, made no objection to the notice to quit, nor set up any right to a longer possession, but said he would go out as soon as he could suit himself with another house, *Ld. Ellenborough* held that it was a question for the jury whether the tenant must not be understood as having admitted that the tenancy was determined by the notice. *Doe d. Baker v. Woombwell*, 3 Camp. 559. So, where a notice was delivered on September 27th to quit "at the expiration of the term for which you hold the same," and the tenant on being served observed, "I hope Mr. M. does not mean to turn me out," evidence was admitted by *Holroyd, J.*, of a general custom in that part of the country to let from Lady-day to Lady-day, and that the defendant's rent was due at Michaelmas and Lady-day respectively, and he directed the jury to presume that this tenancy, like other tenancies in that part of the country, was from Lady-day to Lady-day. *Doe d. Milnes v. Lamb*, *Adams*, Eject. 272. If the tenant, upon application by his landlord, states his tenancy to have commenced on a particular day, being the day named in the notice, he is concluded from disputing the accuracy of such statement. *Doe d. Eyre v. Lambly*, 1 Esp. 635. A receipt for rent, as a year's rent, up to a particular day, is *primâ facie* evidence of the commencement of the tenancy as on that day. *Doe d. Castleton v. Samuel*, 5 Esp. 173.

A notice to quit, posted in time for delivery within business hours at the office of the landlord's agent for management of his property, is sufficient, though through absence the agent did not get it till next day. *Papillon v. Brunton*, 5 H. & N. 518; 29 L. J., Ex. 265. In this case the jury found that the notice was delivered in time, and that the agent ought to have had some one at his office to receive it; but, it has since been held that a notice to quit, if posted in a letter so as to be delivered in due time in the ordinary course of the post, will be presumed to have been so delivered, and such notice is sufficient. *Gresham House Estate Co. v. Rossa Grande Gold Mining Co.*, W. N. 1870, p. 119, E. T., Q. B. The defendant may, of course, rebut such presumption by showing that he has not in fact received

the notice, for the rule laid down with respect to a notice of dishonour, *ante*, p. 384, does not apply to a notice to quit. See also *ante*, p. 524.

By the Agricultural Holdings (England) Act, 1883 (46 & 47 V. c. 61), s. 28, any notice under that Act may be served on the person to whom it is to be given, either personally, or by leaving it for him at his last known place of abode in England, or by sending it in a registered letter addressed to him there, and it will be deemed to be served at the time the letter containing it would be delivered in the ordinary course, and in order to prove service by letter, it shall be sufficient to prove that the letter, containing the notice, was properly addressed and posted. Where a year's notice to quit is, by sect. 33, made necessary in place of half a year's notice, *vide ante*, p. 1015, such notice is within the above section. *Van Gratten v. Trevenen*, (1902) 2 K. B., 82, C. A. As to cases in which the act applies, *vide* sects. 54, 61, *ante*, p. 993.

Notice to quit, by whom to be given.] One of several joint-tenants may give notice, and recover his share. *Doe d. Whayman v. Chaplin*, 3 Taunt. 120. Notice by one joint-tenant on behalf of all, whether with the authority of the others or not, determines the tenancy as to all. *Doe d. Aslin v. Summersett*, 1 B. & Ad. 135, 140. So, a notice by one, where the tenant holds under the joint demise of all. See 2 M. & Ry. 434, n. So, where an agent gives the notice in the name of all, but by the authority of one only, it is good for all; for, *per* Parke, B., the lessee holds only so long as all agree. *Doe d. Kindersley v. Hughes*, 7 M. & W. 129, 141. But a notice required to be "under the hands" of the joint-lessors, is not good, if signed by two only out of three. *Right d. Fisher v. Cuthell*, 5 East, 491. A notice signed by a stranger professing to be an agent for all the joint-tenants, ratified before ejectment brought, was held to be sufficient; *Goodtitle d. King v. Woodward*, 3 B. & A. 689; but the authority of this case has been questioned, and it has been held that a subsequent ratification is not sufficient, unless given before the notice begins to run. *Doe d. Mann v. Walters*, 10 B. & C. 626. Nor is the bringing an action a sufficient recognition; S. C.; for the notice must be one on which the lessee can safely act when given. *Doe d. Lyster v. Goldwin*, 2 Q. B. 143. Where the landlord is partner in a firm to which he has let the premises, he may eject upon a notice to himself and co-tenants; *per* Patteson, J., *Doe d. Harvey v. Francis*, 4 M. & W. 331, Ex. Ch. Where there was a proviso in a lease (made by tenant in fee), that if either party should be desirous to determine it, it should be lawful for him, "his executors or administrators," so to do upon 12 months' notice to the other of them, "his heirs, executors," &c.; it was held that the *devisee* of the lessor might give such notice. *Roe d. Bamford, v. Hayley*, 12 East, 464. A receiver appointed by the High Court with authority to let lands, has also authority to give a notice to quit in his own name. *Wilkinson v. Colley*, 5 Burr. 2694; *Doe d. Marsack v. Read*, 12 East, 57. But, a mere private receiver of rent, as such, has no power to determine a tenancy. *Per* Parke, J., *Doe d. Mann v. Walters*, 10 B. & C. 633. An agent to receive *and let* has authority to determine a tenancy. *Per* Patteson, J., *Doe d. Mauvers, El. v. Mizem*, 2 M. & Rob. 56; see *Papillon v. Brunton*, and *Pearse v. Boulter*, *post*, p. 1020. But the agent of such an agent cannot give a notice. *Doe d. Rhodes v. Robinson*, 3 N. C. 677. Where a *cestui que trust* is allowed by his trustees to have the management of the estates vested in them, he may give a notice to quit in his own name, without showing his authority on the notice. *Jones v. Phipps*, L. R., 3 Q. B. 567. The rule that a notice to quit given by an agent must either state that the agent was duly authorized, or be given in the name of the principal, only applies to an agent holding a special or limited authority, and not to a general agent. *Id.* 573. An oral notice from the steward of a corporation is sufficient, without showing an authority granted

to him under seal. *Roe d. Rochester, Dean of, v. Pierce*, 2 Camp. 96; see *Smith v. Birmingham Gas Co.*, 1 Ad. & E. 531. Where the demise was by persons who were described in the agreement as "the churchwardens of the parish of M." (not naming them), a notice given by an agent for these persons is sufficient, though they had ceased to be in office when the notice was given, and it professed to be given on behalf of "the churchwardens of M.:" the property not being vested in them in a corporate character. *Doe d. Bailey v. Foster*, 3 C. B. 215.

Notice to quit, to whom to be given.] Where the premises have been underlet, the tenancy must be determined by a notice from the lessor to the lessee; a notice from the lessor to the sub-lessee is inoperative; *Pleasant d. Hayton v. Benson*, 14 East, 234; *Hogg v. Brooks*, 14 Q. B. D. 475; 15 *Id.* 256, C. A.; and unnecessary. *Roe v. Wiggs*, 2 N. R. 330. Where A. had been tenant of certain premises and paid rent, and upon A. leaving them, B. took possession, after which neither A. nor B. had paid any rent; it was held, in the absence of any evidence to the contrary, it might be presumed that B. came in as assignee of A., and that notice to quit was therefore rightly given to B. *Doe d. Morris v. Williams*, 6 B. & C. 41. See also *Roe d. Blair v. Street*, 2 Ad. & E. 329. Where a corporation is tenant, the notice to quit should be addressed to the corporation, and served upon its proper officers. *Semble, Doe d. Carlisle, El. v. Woodman*, 8 East, 228. As to how notices are to be served on companies, incorporated under various Acts of Parliament, *vide* Part. III., *Actions by and against companies, post*, pp. 1113, 1127, 1130.

A tenant may give a notice to quit by serving it on the landlord's agent for the management of his property. *Papillon v. Brunton*, 5 H. & N. 518; 29 L. J., Ex. 265. But a notice to quit, given to a mere collector of the landlord's rent, is not sufficient. It should be given to one presumably authorized to receive and acquiesce in it. *Pearce v. Boulter*, 2 F. & F. 133.

Notice to quit, form of.] In ordinary cases, the notice may be oral. *Timmins v. Rowlinson*, 3 Burr. 1603; *Roe d. Rochester, Dean of, v. Pierce*, 2 Camp. 96; *Doe d. Macartney, Ld. v. Crick*, 5 Esp. 196. The form of notice is not material. It must, however, refer to some distinct time; therefore a notice to quit "forthwith," or "from henceforth," or "to quit" generally, would be bad. *Goode v. Howells*, 4 M. & W. 199, 201. But *semble*, a notice to quit given by a tenant "as soon as by law he might," would be good; *per* Lord Abinger, S. C. A notice to quit "at the expiration of the present year's tenancy," is sufficient. *Doe d. Gorst v. Timothy*, 2 Car. & K. 351. Though the courts listen with reluctance to objections to the form of the notice (*Doe d. Rodd v. Archer*, 14 East, 245), it must yet be explicit and positive. *Ahcarn v. Bellman*, 4 Ex. D. 201, C. A. But it is no objection that it contains a further clause "should you retain possession of the premises after the day, before mentioned, the annual rental of the premises, now held by you from me, will be 160% payable quarterly in advance." S. C., explaining the *dictum* of Ld. Mansfield, C.J., in *Doe d. Matthews v. Jackson*, 1 Doug. 175. *Accord. Bury v. Thompson*, (1895) 1 Q. B. 231, 696, C. A. Where the notice stated that the tenant, on failure, would be required to pay double rent or value so long as he retained possession, it was held good. *Doe d. Lyster v. Goldwin*, 2 Q. B. 143. Where the notice was to quit "on the 25th March, or 8th April next ensuing," and was delivered before new Michaelmas-day, it was held good, as intended to meet a holding commencing either at new or old Lady-day, and not to give an alternative. *Doe d. Matthewson v. Wrightman*, 4 Esp. 6. And, a notice to quit at "Michaelmas," if in time, will do either for old or new Michaelmas-day, according to the period of the

commencement of the tenancy. *Doe d. Hinde v. Vince*, 2 Camp. 256; *Dunn d. Willan v. Walker*, Peake, Add. Ca. 194. A notice served on Thursday, Nov. 5th, to quit on or before Friday, Nov. 13th, is sufficient to determine a weekly tenancy commencing on a Thursday. *Harvey v. Copeland*, (1892) 30 L. R., Ir. 412, *diss. Gibson, J.* But, a notice to quit on Oct. 11th (then old Michaelmas day), though served in time, will not determine a holding from new Michaelmas-day. *Doe d. Spicer v. Lea*, 11 East, 312. So, a notice by the lessee to quit on the 24th of June, "agreeably to covenant," the covenant requiring a notice expiring at Michaelmas, is bad; and evidence is not admissible to show that the landlord understood it to mean Michaelmas. *Cadby v. Martinez*, 11 Ad. & E. 720. Where a lease contained a clause enabling the tenant to surrender and deliver up the premises at the end of any three years, he first giving six calendar months' previous notice of his intention so to do; it was held that an unsigned notice given under this clause was good. *Carleton v. Herbert*, 14 W. R. 772, T. T. 1866, 1r. Ex. Ch.

An obvious mistake will not vitiate the notice; as where a notice was given at Michaelmas, 1795, to quit at Lady-day, "which will be in the year 1795," and the defendant was told at the time of the service of the notice that he must quit at *next* Lady-day. *Doe d. Bedford, Dk. of, v. Kightley*, 7 T. R. 63. A notice dated 27th September, and served on the 28th, requiring the tenant to quit at "Lady-day next, or at the end of your current year" (which was Michaelmas), will be understood to mean Michaelmas in the succeeding year. *Doe d. Huntingtower, Ld. v. Culliford*, 4 D. & Ry. 248; *diss. Doe d. Richmond, Mayor of, v. Morphet*, *infra*, but followed in *Wride v. Dyer*, (1900) 1 Q. B. 23. Where a tenancy of land began on 2nd of February, and of a house on 1st May, a notice dated and served on 22nd October, 1833, to quit both land and house, "at the expiration of half a year from this notice, or at such other time or times as your *present* year's holding of the premises or any part thereof respectively shall expire, after the expiration of half a year from this notice," was held a sufficient notice to determine the tenancy of the house on 1st May, 1834, and of the lands on 2nd February, 1835. *Doe d. Williams v. Smith*, 5 Ad. & E. 350. So, a notice to a weekly tenant to quit "on Friday, provided your tenancy expires on that day, or otherwise at the end of your tenancy next after one week from the date of this notice;" was held sufficient to determine a tenancy beginning on a Wednesday. *Doe d. Campbell v. Scott*, 6 Bing. 362. But, where a notice to quit "on 11th October now next, or such other day as your tenancy may expire on," was delivered in June, 1840: it was held that this was not a good notice for Oct. 11th, 1841. *Mills v. Goff*, 14 M. & W. 72. So, a notice served in October, to quit "on 13th May next, or such other day as the *current* year, for which you now hold, will expire," was held not to terminate a Martinmas (November) holding. *Doe d. Richmond, Mayor of, v. Morphet*, 7 Q. B. 577. See, however, *Wride v. Dyer*, *supra*.

A misdescription of the premises, which can lead to no mistake, will not be fatal; as where the notice was to quit "the premises which you hold of me, commonly called The Waterman's Arms," when, in fact, the house was called "The Bricklayers' Arms," there being no sign called The Waterman's Arms in the parish. *Doe d. Cox, v. —*, 4 Esp. 185. So, where the parish was misnamed in the notice. *Doe d. Armstrong v. Wilkinson*, 12 Ad. & E. 743.

As a lessor cannot determine the tenancy as to part of the things demised, the notice must include all the premises held under the same demise; and the courts will, if possible, give effect to the notice so as to determine the tenancy altogether; as where it mentions the chief part of the holding by its name or description. *Doe d. Rodd v. Archer*, 14 East. 245; *Doe d. Morgan*

v. Church, 3 Camp. 71. In the case, however, of a tenancy from year to year to which the Agricultural Holdings (England) Act, 1883, applies, as to which *vide* sects. 54, 61, *ante*, p. 893, the lessor may, under sect. 41, if he require the land for certain improvements specified in that section, give the tenant notice to quit a portion only of his holding, subject to the tenant's right, within 28 days, to give the landlord notice in writing that he "accepts the same, as a notice to quit the entire holding, at the expiration of the current year of tenancy; and the notice to quit shall have effect accordingly." Where the notice is directed to the tenant by a wrong christian name, and he keeps it, the irregularity is waived. *Doe v. Spiller*, 6 Esp. 70. A notice to quit to a tenant of lands originally devised to the rector and churchwardens of a parish and their successors in trust, signed by the now rector and churchwardens, requiring the tenant to deliver up the premises "to the rector and churchwardens for the time being" (there being no such corporation), is bad. *Doe d. Brooks v. Fairclough*, 6 M. & S. 40. See *Doe d. Bailey v. Foster*, 3 C. B. 215, *ante*, p. 1020.

Notice to quit, where to be served.] When the notice is in writing, in the absence of any special terms in the holding, it is not necessary that it should be served upon the tenant *personally*. It is sufficient if the notice is delivered and explained to the servant of the tenant at his dwelling-house, though the dwelling-house be not on the demised premises; such service affording presumptive evidence that the notice came to the hands of the tenant, the servant not being called; *Jones v. Marsh*, 4 T. R. 464; and it is sufficient, though the tenant, by reason of absence, is not informed of it till within half a year of its expiration. *Doe d. Neville v. Dunbar*, M. & M. 10. And service at the tenant's dwelling-house upon a person, whose duty it would be to deliver it to the tenant, is sufficient without proof that he received it, and whether he got it or not. *Tanham v. Nicholson*, L. R., 5 H. L. 561. But, it is not sufficient that the notice was merely left at the tenant's dwelling-house without showing that it was delivered to a servant, or that it came to the tenant's hands. *Doe d. Buross v. Lucas*, 5 Esp. 153. Service of the notice upon a relation of the under-tenant upon the premises, is not sufficient, though the notice was properly addressed to the tenant. *Per* Ld. Ellenborough, *Doe d. Mitchell v. Levi*, Adams, Eject. 92. Service of the notice on the premises upon one of two joint-tenants, who resides on them, is presumptive evidence of the notice having reached the other joint-tenant. *Doe d. Bradford, Ld., v. Watkins*, 7 East, 551; *Doe d. Ld. Macartney v. Criel*, 5 Esp. 196. As to service at an agent's place of business, see *Papillon v. Brunton*, *ante*, p. 1018. The service may be effected by post. S. C.; and *Gresham House Estate Co. v. Rossa Grande Gold Mining Co.*, *ante*, p. 1018. See also the Agricultural Holdings (England) Act, 1883, s. 28, cited *ante*, p. 1019.

Notice to quit, waiver of.] The notice may be waived by the acceptance of rent, due after the expiration of the notice; but the money must be received *quâ* rent; and it is a question for the jury whether it was so received. *Goodright d. Charter v. Cordwent*, 6 T. R. 219; *Doe d. Cheny v. Batten*, Cowp. 243. Where a quarter's rent, due after the expiration of the notice, had been received by the landlord's banker without any special authority, though the rent was usually paid to him, it was held, in the absence of any proof that the rent had come to the landlord's hands, to be no waiver. *Doe d. Ash v. Culvert*, 2 Camp. 387. A distress for rent accruing after the expiration of the notice is a waiver. *Zouch d. Ward v. Willingale*, 1 H. Bl. 311. But, if the distress be only for rent due *at* or *before* the expiration of the notice, it will not be a waiver, if taken within six months of the expiration

of the notice, by reason of stat. 8 A. c. 18, ss. 6, 7, *post*, p. 1081, which gives the landlord power to distrain within six months of the determination of the tenancy. *Semble, per Wilson, J., S. C.* And see *post*, p. 1032, *Forfeiture waived*. A demand of subsequent rent does not necessarily operate as a waiver, but it is evidence for the jury. *Blyth v. Dennett*, 13 C. B. 178; 22 L. J., C. P. 79. The notice may be waived by a subsequent notice, for it recognizes a tenancy subsisting after the expiration of the former. *Doe d. Brierly v. Palmer*, 16 East, 53. But, where a second was given after the expiration of the first, and after the commencement of an ejectment in which the landlord continued to proceed notwithstanding the second notice, it was held no waiver; for it was not possible for the defendant to suppose that the plaintiff intended to waive the first notice, when he knew that the plaintiff was proceeding on it by ejectment. *Doe d. Williams v. Humphreys*, 2 East, 237. So where, after the expiration of a notice, the landlord gave a second notice, "I do hereby require you to quit the premises which you now hold of me within 14 days from this date, otherwise I shall require double value," it was ruled that the latter notice, having for its object only the recovery of the double value, did not operate as a waiver. *Doe d. Digby v. Steel*, 3 Camp. 117. So, where no notice to quit was necessary, and a notice was given "to quit the premises which you hold under me, your term therein having long since expired," the court considered it a mere demand of possession, and not a recognition of a tenancy. *Doe d. Godsell v. Inglis*, 3 Taunt. 54. And, where a landlord gave his tenant notice to quit, but promised not to turn him out unless the premises were sold, and after the expiration of the notice to quit the premises were sold, but the tenant refused to deliver up the possession; it was held, that the promise was no waiver of the notice, and that the refusal of the tenant made him a trespasser from the expiration of the notice. *Whiteacre d. Boulton v. Symonds*, 10 East, 13. A notice may be waived by a tenant who gives it, as well as by a landlord; and where the tenant continues in possession after the expiration of the notice, under an alleged custom, it is a question for the jury whether he intended to waive the notice, or merely acted in pursuance of the supposed custom. *Jones v. Shears*, 4 Ad. & E. 832. The effect of waiving a notice to quit, given to a yearly tenant, is to create a new tenancy, taking effect on the expiration of the old one. *Tugleur v. Wildin*, L. R., 3 Ex. 303.

[*Notice to quit, when dispensed with by disclaimer.*] When a tenant from year to year has attorned to another person, or done any act disclaiming to hold of his landlord, or has in any way put him at defiance, the landlord may treat him as a trespasser, and no notice to quit will be necessary. *Throgmorton v. Whelpdale*, B. N. P. 96; *Doe d. Jefferies v. Whittick*, Gow. 195. The act must be one necessarily inconsistent with the relation of landlord and tenant; thus, where a tenant from year to year, who had concluded a bargain for the purchase of the property from his landlord, provided a good title could be made, refused to deliver it up to the landlord on demand, saying, "he had bought it and would keep it, and was ready to pay the money;" it was held that this was no disclaimer, as it was a claim to purchase consistent with the continuance of the tenancy from year to year in the meantime. *Doe d. Gray v. Stanion*, 1 M. & W. 695; where see the previous cases reviewed. So, a refusal to pay rent to a devisee under a contested will, the tenant declaring that he was ready to pay the rent to any person entitled to it, was held no disclaimer. *Doe d. Williams v. Pasquali*, Peake, 196. So, where rent is demanded by the assignee of the lessor, it is no disclaimer if the defendant withhold rent while he is honestly inquiring into the assignee's title, or because he believes himself liable to the assignor. *Doe d. Williams v. Cooper*, 1 M. & Gr. 135. Where the

defendant, who had been a weekly tenant to M. up to his death, paid rent for a short time afterwards to a person who claimed to be M.'s devisee, but ceased to do so when he received notice of the plaintiff's claim to it as heir-at-law, and on being applied to for rent by the plaintiff's agent, said he would pay no more rent till he knew who was the real owner; this was held no disclaimer. *Jones v. Mills*, 10 C. B., N. S. 788; 31 L. J., C. P. 66. But, a refusal by letter to pay rent, accompanied with a statement that all connection between the claimant and the tenant has ceased, and that he now pays rent to another, is a disclaimer. *Doe d. Grubb v. Grubb*, 10 B. & C. 816. So, where the tenant says to the landlord, "I have no rent for you, because P. has ordered me to pay none," it is a disclaimer. *Doe d. Whitehead v. Pittman*, 2 Nev. & M. 673. So a letter, disputing the right of the landlord to raise the rent of the premises, as he had done by notice to the tenant, coupled with an offer to pay the customary rent of 11s. as being all that was due, is a disclaimer. *Vivian v. Moat*, 16 Ch. D. 730.

Where the defendant, who held under a tenant for life, received, on his death, a letter from the plaintiff claiming as heir and demanding rent, to which the defendant answered that he held the premises as tenant to S., that he had never considered the plaintiff as his landlord, that he should be ready to pay the rent to any one who should be proved to be entitled to it, but that, without disputing the plaintiff's pedigree, he must decline taking upon himself to decide upon his claim without more satisfactory proof in a legal manner; it was held the plaintiff could maintain ejectment without any further demand or notice. *Doe d. Calvert v. Frowd*, 4 Bing. 557. The lessee for years, under a lease made by tenant in tail, which was not binding on the remainderman, C., refused, on demand, to pay rent to C. after the lessor's death, alleging that another person was entitled whom he was willing to pay; it was held that this disclaimer enabled C. to bring ejectment without notice or demand of possession; and that the mere demand of rent did not make a tenancy between the defendant and C. *Doe d. Phillips v. Rollings*, 4 C. B. 188. Tenant at will died, and his heir entered and claimed the land as his own; it was held that the devisees of the lessor might eject without notice or demand. *Doe d. Burgess v. Thompson*, 5 Ad. & E. 532.

Though a mere oral disavowal by the tenant of the holding under the particular landlord, has been held sufficient disclaimer to dispense with a notice to quit, in the case of a tenancy from year to year; see *per Cur. Doe d. Gray v. Stanion*, 1 M. & W. 702; an oral disclaimer is not sufficient to work a forfeiture of a definite term of years under a lease by deed. *Doe d. Graves v. Wells*, *infra*; nor does the mere act of paying the rent to a third person operate as a forfeiture of a lease; *Doe d. Dillon v. Parker*, Gow, 180; for that purpose some act, such as delivering up possession of the premises and the lease, in fraud of the landlord, to one claiming under a hostile title, may be sufficient. *Doe d. Ellerbrock v. Flynn*, 1 C. M. & R. 137. But, that case was put in *Doe d. Graves v. Wells*, 10 Ad. & E. 427, as proceeding expressly on the fraud; and in this last case it was held, that a definite term of years was not forfeited by an oral refusal to pay rent, on the ground that the land belonged to the tenant and not to his lessor; and the court there considered a disclaimer by a yearly tenant to be rather evidence of a determination of the will, and so a dispensing with a notice to quit, than a forfeiture of the estate; and *per Maule, J.*, in *Doe d. Phillips v. Rollings*, 4 C. B. 192-3, "A disclaimer dispenses with a notice to quit in the case of a tenant from year to year, who is otherwise entitled to such notice. Where a term of years is vested in a party, it is contrary to the Statute of Frauds to allow the term to be divested out of him by matter of parol."

The disclaimer relied upon must be prior to the date of the writ. *Doe d. Lewis v. Cardor*, 1 C. M. & R. 398. An admission of a disclaimer by the tenant in possession is evidence against one who defends as his landlord. *Doe d. Mee v. Litherland*, 4 Ad. & E. 784.

[*Proof of forfeiture of the lease.*] Where the lessor proceeds on a forfeiture of the lease, he must prove the demise and the forfeiture incurred, and, in general, service of the written notice required by the Conveyancing and Law of Property Act, 1881 (41 & 45 V. c. 41), ss. 11 (1), 67, *post*, p. 1029.

As to how far a disclaimer may work a forfeiture, *vide ante*, pp. 1023 *et seq.*

The right of re-entry will appear on proof of the lease. The general rule is, that a clause of re-entry is to be construed strictly; *per* Ld. Tenterden, C.J., *Doe d. Palk v. Marchetti*, 1 B. & Ad. 720; and a question may arise whether from its form it extends to negative as well as affirmative covenants; see S. C., and *Harman v. Ainslie*, (1904) 1 K. B. 698, C. A., in which the earlier cases and *dicta* are cited. The term "perform" will apply to a negative covenant. S. C. Where the forfeiture is for the non-performance of a covenant, the burden of proof, although negative, is on the plaintiff. *Doe d. Chandless v. Robson*, 2 C. & P. 245; *Doe d. Bridger v. Whitehead*, 8 Ad. & E. 571; and *Tolman v. Portbury*, L. R., 5 Q. B. 288, Ex. Ch., cited *ante*, p. 95. In an agreement of demise it was "stipulated and conditioned that the tenant should not assign," &c.; this was held to be a condition, for the breach of which the lessor might maintain ejectment. *Doe d. Henniker v. Watt*, 8 B. & C. 308; where see cases cited as to what words create a condition; see also *In re Brain*, L. R., 18 Eq. 389. But mere words of agreement cannot create a condition. *Crawley v. Price*, L. R., 10 Q. B. 302. Where the lessee underlet, and in the under-lease there was a proviso that, in case of a breach of covenant, the lessee and lessor might enter, it was held that this proviso gave a separate right of re-entry to the lessee or lessor. *Doe d. Bedford v. White*, 4 Bing. 276. See *Greenaway v. Hart*, 14 C. B. 340; 23 L. J., C. P. 115, cited *ante*, p. 727.

The lessor cannot re-enter after he has parted with his reversion. *Fenn d. Matthews v. Smart*, 12 East, 441; *Doe d. Marriott v. Edwards*, 5 B. & Ad. 1065; *vide ante*, p. 725. But where a termor demised for the whole of his term, it was held that he could enter on a forfeiture for a breach of condition. *Doe d. Freeman v. Bateman*, 2 B. & A. 168, following Litt. s. 325; Co. Litt. 202 a; see *Hyde v. Warden*, 3 Ex. D. 72, C. A.

By the 32 H. 8, c. 34, grantees or assignees of reversions may take advantage of conditions of re-entry against lessees, their assigns, &c., "for non-payment of rent, for waste, and other forfeiture." The condition must be *ejusdem generis* as those mentioned; Co. Litt. 215 b; where see further on this statute. It applies only where the lease has been created by deed. *Vide ante*, p. 349. A condition not to assign was formerly thought to be collateral; *Pennant's case*, 3 Rep. 64 a; *Collins v. Sillye*, Styles, 265; and therefore not within the statute; but in *Lucas v. How*, T. Raym. 250, this was doubted; and it has since been held, that a covenant in which the assigns are named, not to assign without licence, runs with the land; *Williams v. Earle*, L. R., 3 Q. B. 739; and it therefore seems that the benefit of such a covenant not to assign will run with the reversion, for whether a condition or a covenant runs with the land is determined on the same principles. *Horsley Estate v. Steiger*, (1899) 2 Q. B. 79, 88, *per* C. A. A covenant made by the grantee with the grantor of a right of shooting over certain lands, to leave the land at the end of the term stocked with game, runs with the reversion; *Hooper v. Clark*, L. R., 2 Q. B. 200; but not a

condition of forfeiture if the tenant of the land demised is convicted of an offence under the Game Acts. *Stevens v. Copp*, L. R., 4 Ex. 20. As to what covenants have been held to run with the reversion, see Chitty's Stat. 3rd ed. vol. ii. 1097, (a); 5th ed. vol. vi. tit. *Landlord and Tenant*, 8 (g); *Fleetwood v. Hull*, 23 Q. B. D. 35; *Clegg v. Hands*, 44 Ch. D. 503, C. A.; and *White v. Southend Hotel Co.*, (1897) 1 Ch. 767; *Manchester Brewery Co. v. Coombs*, (1901) 2 Ch. 608; *Horsey Estate v. Steiger*, ante, p. 1025. The act applies to a surrenderee of a reversion on a lease of copyholds; *Glover v. Cope*, 3 Lev. 326; 4 Mod. 80; even though the lease be invalid; *Whitton v. Peacock*, 3 Myl. & K. 325; and, of incorporeal hereditaments, as a licence to dig for minerals. *Martyn v. Williams*, 1 H. & N. 817; 26 L. J., Ex. 117; *Norval v. Pascoe*, 34 L. J., Ch. 82. By the Conveyancing and Law of Property Act, 1881 (44 & 45 V. c. 41), s. 10, ante, p. 724, every condition of re-entry made after Dec. 31st, 1881, shall be annexed to the reversion immediately expectant on the lease, notwithstanding severance of such reversion, and may be enforced by the person entitled to the income of the land leased. See *Municipal, &c. Building Society v. Smith*, 22 Q. B. D. 70. It would seem not to be necessary for such person to have the legal reversion by interest or estoppel; nor that the lease should have been created by deed, when valid if by parol. It must appear that the forfeiture accrued after the plaintiff became assignee of the reversion; for a right of entry for condition broken is not within 8 & 9 V. c. 106, s. 6, and does not lie in grant. *Hunt v. Bishop*, 8 Exch. 675; 22 L. J., Ex. 337; and see *Hunt v. Remnant*, 9 Exch. 635; 23 L. J., Ex. 135, Ex. Ch. Such a right is, however, devisable by will under stat. 1 V. c. 26, s. 3. Where the forfeiture is for non-payment of rent, it must be proved that notice of assignment was given to the defendant before the forfeiture accrued; *Mallory's case*, 5 Rep. 113 b; *Fraunces' case*, 8 Rep. 92 a; S. C., sub nom., *Miller v. Francis*, 1 Godb. 279; Co. Litt. 215 b; but such notice is unnecessary where the forfeiture is for any other cause. *Scallock v. Harston*, 1 C. P. D. 106. A grantee of part of a reversion was not within this statute; but by the Law of Property Amendment Act, 1859, 22 & 23 V. c. 35, s. 3, where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall in respect of the apportioned rent, &c., allotted or belonging to him, have the benefit of all conditions of re-entry for non-payment of the original rent, &c., as if such conditions had been reserved to him as incident to his part of the reversion, in respect of the apportioned rent, &c. And now by the Conveyancing and Law of Property Act, 1881 (44 & 45 V. c. 41), s. 12, (1) "Notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease" made after Dec. 31st, 1881; see sect. 12 (2); "and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition, contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease."

Re-entry for non-payment of rent.] If the proceeding be at common law on a condition of re-entry for non-payment of rent, there must be a demand by the landlord, or his agent duly authorized, of the precise rent due and

payable to save the forfeiture, on the exact day on which it so became due and payable, at the proper place of payment, at a convenient hour before and at sunset. 1 Wms. Saund. 287 *et seq.* (16); *Doe d. Wheeldon v. Paul*, 3 C. & P. 613; *Hill v. Kempshall*, 7 C. B. 975; *Acocks v. Phillips*, 5 H. & N. 183; *Barry v. Glover*, 10 Ir. C. L. R. 113, C. P. Where the agent has his authority with him he need not produce it unless asked for. *Roe d. West v. Davis*, 7 East, 363. Where the rent is payable quarterly the demand must be confined to the last quarter's rent. *Doe d. Wheeldon v. Paul*, *supra*; *Scot v. Scot*, Cro. Eliz. 73. The demand must be made at the place where the rent is made payable, if such be named. *Buskin v. Edmunds*, Id. 415; *Borough's case*, 4 Rep. 72. If no such place be named, then it must be made on the land, at the most notorious place of it; therefore, if there be a dwelling-house, it must be made there, at the front door. 1 Wms. Saund., *supra*. These formalities may, however, be dispensed with by express stipulation in the lease. *Doe d. Harris v. Masters*, 2 B. & C. 490; see *Phillips v. Bridge*, L. R., 9 C. P. 48. And by the C. L. P. Act, 1852, s. 210 (making similar provisions to those contained in 4 G. 2, c. 28, s. 2), where *half a year's rent shall be* in arrear, and the landlord to whom the same is due hath right by law to re-enter for the non-payment, the landlord may, without any formal demand or re-entry, serve a writ in ejectment; or, in case it cannot be served, or no tenant be in possession, affix a copy thereof upon the door of some messuage, or if the ejectment be not for a messuage, upon some notorious place of the lands, &c.; and such affixing shall be deemed legal service thereof; which service or affixing shall stand in the place of a demand and re-entry; and in the case of judgment against the defendant for non-appearance, if it shall be made appear to the court where the said action is pending by affidavit, or be proved upon the trial, in case the defendant appears, that half a year's rent was due *before* the said writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears *then due*, and that the lessor had power to re-enter, in such case the lessor shall recover judgment and execution, as if the rent in arrear had been legally demanded and a re-entry made; and if judgment be recovered, and execution to be executed thereon, without the payment by the lessee of the rent and arrears and costs, or without proceeding for relief in equity (or, at common law; see C. L. P. Act, 1860, s. 1, *post*, p. 1034), within six months after execution executed, then the lessee and his assigns, &c., shall be barred and foreclosed from all relief in law or equity, other than proceedings in error, and the landlord shall from thenceforth hold the demised premises discharged from such lease. It seems that, by Rules, 1883, O. ix. r. 2, the writ must now be served personally unless an order for substituted service has been obtained, or (r. 9) unless there is vacant possession, and service can only be effected by posting up a copy of the writ on the premises.

Under this statute the landlord must be prepared with evidence of the right of re-entry; the service of the writ, or the affixing of a copy of it, &c., that half a year's rent was in arrear; and that no sufficient distress was found on the premises. The plaintiff's title accrues on the day when the forfeiture would have been complete at common law, and the date of the writ must be subsequent to that day. *Doe d. Lawrence v. Shawcross*, 3 B. & C. 752. It seems that it must appear that the landlord had power to re-enter in respect of the non-payment of half a year's rent remaining actually due; *Cotesworth v. Spokes*, 10 C. B., N. S. 103, 112; 30 L. J., C. P. 220, 229, cited further, *post*, p. 1033; at the time of issuing the writ. *Doe d. Dixon v. Roe*, 7 C. B. 134. The receiver or agent of the landlord who has been in the habit of receiving rent on behalf of the latter, is competent to prove the non-payment. *Doe d. Charles v. Roe*, 2 Dowl. 752. The insufficiency of the distress must be proved. *Doe d. Forster v. Wandlass*, 7 T. R. 117. It is sufficient *prima facie*

to prove that there was no sufficient distress on the premises on a certain day between the day when the rent became in arrear and the service of the writ. *Doe d. Smelt v. Fuchau*, 15 East, 286. And, no sufficient distress is "to be found on the premises," unless the goods are so visibly there that a broker, using reasonable diligence, would find them so as to be able to distrain. *Doe d. Haverson v. Franks*, 2 Car. & K. 678. It must appear that every part of the premises has been searched; *Rees d. Powell v. King*, cited 2 B. & B. 514; Forrest, 19; unless the tenant has prevented the landlord from having access to the premises, as by locking the door; for a distress, which cannot be made without a trespass, is no available distress within the act. *Per* Ld. Tenterden, C.J., *Doe d. Chippendale v. Dyson*, M. & M. 77; and *per* Martin, B., *Hammond v. Mather*, 3 F. & F. 151. In such a case it will be enough to swear to a belief that there was no sufficient distress on the premises. *Doe d. Cox v. Roe*, 5 D. & L. 272. So, if part of the premises have been deserted by the tenant, and a person have been put in by the landlord to take care of it, proof that there was no available distress on that part of the premises, when so taken possession of by the landlord, and no sufficient distress on the rest of the premises at the time of the distress, is sufficient evidence to maintain the action. *Wheeler v. Stevenson*, 6 H. & N. 155; 30 L. J., Ex. 46. And it would seem that proof that more than half a year's rent is due, and that no sufficient distress countervailing all the arrears is to be found, will enable the landlord to avail himself of the statute. *Cross v. Jordan*, 8 Exch. 149; 22 L. J., Ex. 70; overruling *Doe d. Powell v. Roe*, 9 Dowl. 548. In considering the sufficiency of a distress on the premises, those goods which cannot be legally seized, must not be taken into account; as to what goods are so privileged, *vide ante*, pp. 903 *et seq.*; the provisions of the stat. 34 & 35 V. c. 79, protecting lodgers' goods, often create great difficulty in ascertaining whether there is a sufficient distress on the premises or not. *Vide ante*, pp. 904, 905. As to sufficiency of distress and legitimate charges for keeping possession, in the case of growing crops, see *Ex pte. Arnison*, L. R., 3 Ex. 56.

Where a lease contained a proviso for re-entry in case the rent was in arrear 21 days after the day on which it was due, "being lawfully demanded," it was held to be within the statute, and that it was unnecessary to prove an actual demand. *Doe d. Scholefield v. Alexander*, 2 M. & S. 525; *accord. Doe d. Shrewsbury, El. of v. Wilson*, 5 B. & A. 363. But, if the proviso in the lease do not avoid it, as where the right of re-entry is to hold till the arrears are paid, the statute does not apply, and the common law forms must be adhered to. *Doe d. Dorke v. Bowditch*, 8 Q. B. 973. But, *quære* whether any demand was there necessary at common law, as it was not a case of forfeiture. See *Doe d. Biass v. Horsley*, 1 Ad. & E. 766. In that case a rent-charge was granted, with power to the grantee, in case the rent should be in arrear for a certain time, to enter and enjoy the lands charged, and to receive the rents, &c., for his own use, until satisfaction of the arrears, and it was held that the grantee might, upon the rent becoming in arrear, maintain ejectment against the terre-tenant without proof of a previous demand of the rent. Where rent is payable "on the usual quarter-days and always, if required, in advance," a demand must, it seems, be made before enforcing any remedy for non-payment of rent in advance. *L. & Westminster Loan Co. v. L. & N. W. Ry. Co.*, (1893) 2 Q. B. 49, cited *post*, p. 1086.

Where the plaintiff is the assignee of the reversion he must show that the defendant had notice of the assignment before action brought. *Vide ante*, p. 1026.

The right of re-entry for non-payment of rent is not affected by the stat. 44 & 45 V. c. 41, s. 14 (*post*, p. 1029), see sub-sect. 8.

Re-entry for other breaches of condition.] Vide sub tit., Action on

Covenants relating to Land, ante, pp. 731 *et seq.*, where the most usual breaches of covenant, and proofs of them, are noticed; the lease usually contains a condition of re-entry on the breach of any of the covenants. As to the onus of proof, *vide ante*, pp. 94, 95.

By the Conveyancing and Law of Property Act, 1881 (44 & 45 V. c. 41), s. 14 (1), "A right of re-entry or forfeiture, under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor, for the breach." A lease here "includes an original or derivative under-lease, also a grant at a fee-farm rent, or securing a rent by condition" (sub-sect. 3), and "a lease limited to continue as long only, as the lessee abstains from committing a breach of covenant" (sub-sect. 5). The section applies, although the proviso for re-entry is inserted in pursuance of the directions of a statute (sub-sect. 4). But by sub-sect. 6, "This section does not extend (i.) to a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased, *or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessor's interest,*" *vide post*, p. 1030, "or (ii.) in the case of a mining lease, to a covenant or condition for allowing the lessor to have access to, or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof." Nor does it "affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent" (sub-sect. 8). This section applies to leases made either before or after the commencement of this act, and shall have effect notwithstanding any stipulation to the contrary (sub-sect. 9). On sub-sect. 6, see *Ex pte. Gould*, and *Gentle v. Faulkner*, *post*, p. 1031.

By sect. 2 (xv.) "Bankruptcy includes liquidation by arrangement, and any other act or proceeding in law having, under any act for the time being in force, effects or results—similar to those of bankruptcy; and bankrupt has a meaning corresponding with that of bankruptcy."

By Sect. 67 (1), "any notice required or authorized by this act to be served shall be in writing." It shall be sufficient although only addressed to the lessee by that designation, "without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained" (sub-sect. 2). It "shall be sufficiently served on the lessee if left at his last known place of abode or business in the United Kingdom" or "is affixed, or left for him on the land, or any house, or building comprised in the lease, or in case of a mining lease, is left for him at the office, or counting-house of the mine" (sub-sect. 3), or "if it is sent by post in a registered letter, addressed to the lessee" . . . "by name, at the aforesaid place of abode, or business, office, or counting-house, and if that letter is not returned through the post-office undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered" (sub-sect. 4).

Sect. 14 does not extend to an agreement for a lease of which the tenant is not entitled to specific performance, although rent has been paid thereunder. *Swain v. Ayres*, 20 Q. B. D. 585; 21 *Id.* 289, C. A. But now by the Conveyancing and Law of Property Act, 1892 (55 & 56 V. c. 13) (which by sect. 1 is to be read with 44 & 45 V. c. 41), s. 5, "lease" or "under-lease" in 44 & 45 V. c. 41, s. 14, *supra*, includes an agreement for a lease or

under-lease where the lessee or under-lessee "has become entitled to have his lease granted;" and "'under-lessee' shall include any person deriving title under or from an under-lessee."

In cases in which sect. 14 applies, it prevents a lessor from recovering possession peaceably, if he have not given notice under the section. *Ex pte. Lovell*, (1901) 2 K. B. 16.

The "particular breach" must be stated in the notice with sufficient particularity to enable the lessee to know of what complaint is made, and to remedy it before action. *Fletcher v. Nokes*, (1897) 1 Ch. 271. See also *In re Serle*, (1898) 1 Ch. 652; and *Jacob v. Down*, (1900) 2 Ch. 156. This expression "means the neglect to deal with the condition of the premises so pointed out, and not merely failure to comply with the covenants of the lease," *per* Collins, L.J., in *Penton v. Barnett*, (1898) 1 Q. B. 276, 281. Thus, where a lease contained a general covenant to repair, and also a covenant to repair after three months' notice, and the lessor gave a notice under the act to repair within three months, it was held he could recover possession in respect of non-repair between the expiration of the notice and the date of writ without a fresh notice. S. C. It is sufficient if the notice be good in part, although it also contain claims which cannot be enforced, *Lock v. Pearce*, *infra*; or allege breaches which are not proved, *Pannell v. City of London Brewery Co.*, (1900) 1 Ch. 496. As to what is a reasonable time to give in the notice, see *Horsey Estate v. Steiger*, *infra*.

No claim for compensation in money need be made in the notice under sect. 14 (1), where the landlord does not seek such compensation. *Lock v. Pearce*, (1893, 2 Ch. 271, C. A. Reasonable compensation in money does not include a surveyor's fee for the examination of the premises, for sect. 14 (1) does not extend the landlord's rights. *Skinner's Co. v. Knight*, (1891) 2 Q. B. 542, C. A. Now, however, see 55 & 56 V. c. 13, s. 2 (1), cited *post*, p. 1035. By *Id.* sect. 2 (2), the 44 & 45 V. c. 41, s. 14 (6), *ante*, p. 1029, is to apply to the cases therein stated in italics, "only after the expiration of one year from the date of the bankruptcy, or taking in execution, and provided the lessee's interest be not sold within such one year, but in case the lessee's interest be sold within such one year, sub-sect. 6 shall cease to be applicable thereto." But by 55 & 56 V. c. 13, s. 2 (3), *Id.* s. 2 (2), "is not to apply to any lease of —(a.) agricultural or pastoral land: (b.) mines or minerals: (c.) a house used or intended to be used as a public-house or beershop: (d.) a house let as a dwelling-house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures: (e.) any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him."

The reservation of an additional rent, on breach of a covenant, does not, unless such rent has been paid, prevent the lessor from enforcing a condition for re-entry on breach of the covenant. *Weston v. Metrop. Asylum*, 9 Q. B. D. 404, C. A. In a lease to a company, under a proviso for re-entry if the lessees "shall be wound up voluntarily, or by compulsion, or otherwise, under the provisions of any Act" of Parliament, the landlord may re-enter on the making of the winding-up order, *General Shure & Trust Co. v. Wetley Brick & Pottery Co.*, 20 Ch. D. 260, C. A.; even although the company be solvent and the liquidation be for the purpose of reconstruction or amalgamation only. *Horsey Estate v. Steiger*, (1899) 2 Q. B. 79, C. A.; *Fryer v. Ewart*, (1902) A. C. 187, D. P. Such liquidation is within 44 & 45 V. c. 41, ss. 2 (xv.), 14 (6) *ante*, p. 1029, S. CC. As to what constitutes it, see *In re S. African, &c. Storage Co.*, (1904) 2 Ch. 268. A proviso in a lease made in 1880, that a term should cease in case the lessee should file a petition in

liquidation, is broken by the lessee presenting a bankruptcy petition under the Bankruptcy Act, 1883. *Ex pte. Gould*, 13 Q. B. D. 454. Such a breach was held not to be within the protection of the Conveyancing, &c. Act, 1881, s. 14, *ante*, p. 1029, *semble* by reason of sub-sect. 6. S. C. But now see 55 & 56 V. c. 13, s. 2 (2), *ante*, p. 1030, the effect of which is in other than the cases excepted by *Id.* s. 2 (3), *supra*, to take the case of forfeiture on bankruptcy, &c., out of 44 & 45 V. c. 41, s. 14 (6), for the period of one year from the date of the bankruptcy, &c., so that within that period notice of the breach must, under *Id.* s. 14 (1), *ante*, p. 1029, be given prior to action. *Horsley Estate Co. v. Steiger*, *ante*, p. 1030. Where a lease containing a condition of re-entry on the bankruptcy of the lessee D., or his assigns, has been assigned, there is no forfeiture on the subsequent bankruptcy of D., as the condition has reference only to the person then owning the term. *Smith v. Gronow*, (1891) 2 Q. B. 391. As to the effect of annulment of the bankruptcy, *vide*, *Id.* p. 398, *per* Wright, J. The notice under sect. 14 (1) must be served on the lessee, although he has executed a deed, declaring that he stood possessed thereof for K., a trustee for his creditors, and K. has entered into possession. *Gentle v. Faulkner*, (1900) 2 Q. B. 267, C. A. Where the real object of the action is not to recover possession, but to enforce the performance of the lessee's covenant to repair, it is not necessary to make defendants, his weekly tenants who are in occupation. *Geen v. Herring*, (1905) 1 K. B. 152, C. A.

Where a licence has been granted to assign, &c., all, or any part of the demised premises, this formerly put an end entirely to the condition not to assign and to the clause of re-entry: *Dumpro's case*, 4 Rep. 119 b; 1 Smith's L. C.; but by the 22 & 23 V. c. 35, ss. 1, 2, a licence to assign or do any other act only operates for the particular purpose expressed in it, and the condition and right of re-entry remain as to all other or subsequent breaches. See *Eyton v. Jones*, 21 L. T., 789, H. T., 1870, C. P. In the absence of an express provision to the contrary, the only charge payable for a licence to assign, is a reasonable sum for expenses, 55 & 56 V. c. 13, s. 3. See *In re Cosk's Contract*, (1897) 1 Ch. 9, C. A.; and *Waite v. Jennings*, (1906) 2 K. B. 11, C. A. As to protection to purchaser against prior breach of covenant to insure, by production to him on purchase, of receipt for rent, see 22 & 23 V. c. 35, s. 8.

Forfeiture waived.] Where the lease is voidable on breach of covenant or condition, at election, and not absolutely void, the defendant may show that the forfeiture has been waived. A lease conditioned to be void for the benefit of one party is voidable only at the election of that party; therefore a lease, with condition that upon the breach of some covenant by the lessee, it "shall be to all intents and purposes void," is voidable only at the option of the lessor. *Rede v. Farr*, 6 M. & S. 121; *Doe d. Bryan v. Bancks*, 4 B. & A. 401; see also *Davenport v. Reg.*, *infra*. And this option must be manifested by some act, *Roberts v. Davey*, 4 B. & Ad. 664. And, in the case of a freehold, 1 Wms. Saund. 217 d, (16); or of a lease for years, where the proviso making the lease void contains in addition the words, "and it shall be lawful for the landlord to re-enter;" *Arnsby v. Woodward*, 6 B. & C. 519; that act must be a re-entry. But no actual entry is necessary, the bringing ejectment is sufficient. See cases cited 1 Wms. Saund. 287 d, (16). If, before declaring such option, the landlord, with notice of the forfeiture, accept rent accruing since the forfeiture, it is a waiver. *Goodright d. Walter v. Davids*, Cowp. 803; *Arnsby v. Woodward*, *supra*. And this, although he declares that he accepts the money, not as rent, but as compensation, provided the lessee declares that he pays it as rent; and a protest, that he does not take it as a waiver, is inoperative. *Davenport v. Reg.*, 3 Ap. Ca. 115, J. C.; *Croft v. Lumley*, 5 E. & B. 648; 25 L. J., Q. B. 73. And, it is not necessary

that he should know of every specific act; for a waiver as to one act specifically known, will be a waiver as to all of the same class. *S. C.* But, if at the time he accepted the rent he were ignorant of the forfeiture, the acceptance is no waiver. *Roe d. Gregson v. Harrison*, 2 T. R. 425. Notice of the forfeiture is, therefore, a material and issuable fact. *Pennant's case*, 3 Rep. 64 b.

In *Doe d. Nash v. Birch*, 1 M. & W. 408, Parke, B., expressed a decided opinion (although it was not necessary for the decision of the case), that an absolute unqualified demand of subsequent rent would amount to a waiver of the forfeiture; and this was cited with approbation in *Dendy v. Nicholl*, 4 C. B., N. S. 376; 27 L. J., C. P. 220; in which it was held that bringing an action for such rent is a waiver, as was held also in *Roe d. Crompton v. Minshall*, B. N. P. 96 c. See also *Green's case*, *infra*. The acceptance of rent from an insolvent after his discharge was a waiver of the forfeiture by insolvency; and the non-payment of a scheduled debt due to the lessor was not a continuing insolvency. *Doe d. Gatehouse v. Rees*, 4 N. C. 384. The acceptance, after the forfeiture, of rent due before, is not a waiver; *Green's case*, Cro. Eliz. 3; but, if the receipt for such rent describe the lessee as tenant, that is sufficient evidence of a waiver. *S. C.* And, though some positive act is necessary, and merely lying by and witnessing a forfeiture is not a waiver; *Doe d. Sheppard v. Allen*, 3 Taunt. 78; yet, if the landlord by thus lying by, or by other act or word, cause the lessee to believe that the tenancy is treated as still subsisting, the landlord cannot afterwards avail himself of the forfeiture. See *per* Mansfield, C.J., *S. C.*; the judgments in *Ward v. Day*, 4 B. & S. 337; 33 L. J., Q. B. 3; and *S. C.* in Ex. Ch., 5 B. & S. 362; 33 L. J., Q. B. 255; and *Green's case*, *supra*. Where the proviso avoided the lease by neglect of repairs three months after notice to do them, and notice was given accordingly on Jan. 6th, receipt of rent due on Mar. 25th was held no waiver. *Doe d. Rankin v. Brindley*, 4 B. & Ad. 84, 86.

At common law a distinction has been taken between the effect of a receipt of rent and a distress as a waiver of a forfeiture; and a distress made after the forfeiture had accrued, whether for rent due before or after the forfeiture, was a waiver, inasmuch as a distress could not be made at common law after the tenancy had determined; and therefore by distraining, the lessor confirmed the continuance of the tenancy up to the time of taking the distress. See 14 Ass. pl. 10; Co. Litt. 211 b; *Green's case*, Cro. Eliz. 3; 3 Rep. 64 b; Plowd. 133; and Roll. Abr. Confirmation (B), pl. 2; Viner, Abr. Confirmation (B), pl. 2. The stat. 8 A. c. 18 (c. 14, Ruff.), which (sects. 6, 7, *post*, p. 1081) allows a distress within six months of the determination of the tenancy if the tenant remain in possession, makes no difference in respect of distresses taken within six months of the forfeiture accruing, for rent due before the forfeiture, as the sections apply only where the term expires by effluxion of time, or notice to quit; and not where it is determined by disclaimer or forfeiture. *Doe d. David v. Williams*, 7 C. & P. 322; *Grimwood v. Moss*, L. R., 7 C. P. 360; *sed vide contra*, *per* Wilson, J., in *Zouch d. Ward v. Willingale*, 1 H. Bl. 312, *ante*, p. 1022; see also *Ward v. Day*, *ante*, p. 1032.

Taking proceedings in ejectment amounts to a final election on the part of the lessor to avail himself of the forfeiture and to avoid the lease; *Serjeant v. Nash, Field & Co.*, (1903) 2 K. B. 304, C. A.; hence neither the receipt of rent that would have accrued subsequently to the forfeiture; *Doe d. Morecraft v. Meux*, 1 C. & P. 316, *cor.* Ld. Tenterden, C.J.; approved in *Jones v. Carter*, 15 M. & W. 718, 725; nor, a distress for such rent; *Grimwood v. Moss*, L. R., 7 C. P. 360; nor, the delivery of particulars of breaches complaining of non-payment of rent, together with other breaches; *Tolman v. Portbury*, L. R., 6 Q. B. 245; L. R., 7 Q. B. 314, Ex. Ch., will,

after action, waive the forfeiture. It would seem that to constitute such election the writ must be *served* as well as issued, or at least, that the defendants had notice of the writ; the cases of *Doe d. Morecraft v. Meux*, and *Jones v. Carter, ante*, p. 1032, were prior to the C. L. P. Act, 1852, when the action began by service of the declaration in ejectment. It was held by Fry, J., in *Evans v. Davis*, 10 Ch. D. 747, that the plaintiff's right to re-enter for breach of condition, might be waived by reason of allegations made in the statement of claim, for the purpose of obtaining an injunction against breaches of the same condition.

Where the lessor proceeds for a forfeiture by non-payment of rent, under the C. L. P. Act, 1852, *ante*, p. 1027, he does not waive his right of re-entry by taking an insufficient distress for the rent by the non-payment of which the lease was forfeited; *Brewer d. Ouslow, Id. v. Eaton*, 3 Doug. 230, cited 6 T. R. 220; for "the distress affords no presumption that the landlord has waived the forfeiture, because as the statute" (1 G. 2, c. 28, s. 2, similar in terms), "requires him to prove on the trial that no sufficient distress was to be found on the premises countervailing the arrears due, he has discontinued" . . . "to complete the title given him by the statute;" *per* *Ld. Mansfield, C.J., S. C. Accord. Thomas v. Lulham*, (1895) 2 Q. B. 400, C. A. In these cases six months' rent remained in arrear after what was obtained by the distress. Where, however, a distress, which had been levied *before* the time limited for forfeiture for non-payment, realized enough to reduce the arrears to below half a year's rent, the statute does not apply. *Cotesworth v. Spokes*, 10 C. B., N. S. 103; 30 L. J., C. P. 220, explained in *Thomas v. Lulham, supra*.

Where a lease contained a clause of re-entry in case the rent should be in arrear 21 days, and there should be no sufficient distress, *Ld. Ellenborough* held that the landlord, having distrained within the 21 days, and continued in possession after, did not waive his right of re-entry. *Doe d. Taylor v. Johnson*, 1 Stark. 411. See further, *Shepherd v. Berger*, (1891) 1 Q. B. 597, C. A. In the case of a proviso to re-enter after three months' notice to repair, an agreement to allow the tenant more than three months' time to repair, is a suspension, and not a waiver of the forfeiture. *Doe d. Rankin v. Brindley*, 4 B. & Ad. 84.

Where a lease contains a general covenant to repair, and also a covenant to repair upon three months' notice, these are independent covenants; *Baylis v. Le Gros*, 4 C. B., N. S. 537; and the landlord does not waive his right of re-entry for the breach of the general covenant, by giving a notice "to repair forthwith;" *Roe d. Goatly v. Paine*, 2 Camp. 520; or to repair "in accordance with the covenants" in the lease; *Few v. Perkins*, L. R., 2 Ex. 92; for the notice will be taken to be a notice to repair under the general covenant. *Id.* 95. But, where the lease contained covenants to keep the premises in repair, and to repair within three months after notice, and a clause of re-entry for the breach of any covenant, and the landlord gave a notice to repair within three months; it was held that this was a waiver of the forfeiture incurred by the breach of the general covenant, and that the landlord could not bring ejectment until the expiration of the three months. *Doe d. Morecraft v. Meux*, 4 B. & C. 606. If the notice in this case had been held to apply to the general covenant to repair, it would have deluded the tenant. L. R., 2 Ex. 95, *per* Kelly, C.B. So where, besides the general covenant to repair, with a right of re-entry on breach, there was a proviso that if the lessee did not repair within two months after notice, the lessor might enter and do the repairs himself at the tenant's expense, it was held that the lessor could not proceed to eject on the general covenant, after giving the tenant notice to repair under the above proviso. *Doe d. De Rutzen v. Lewis*, 5 Ad. & E. 277. See also *Hughes v. Metropolitan Ry. Co.*, *post*, p. 1034.

A waiver of a forfeiture incurred by a breach of a continuing covenant, as not to use rooms in a particular manner; *Doe d. Ambler v. Woodbridge*, 9 B. & C. 376; or, to keep insured; *Doe d. Muston v. Gladwin*, 6 Q. B. 953; or to repair; *Doe d. Baker v. Jones*, 5 Exch. 498; is no waiver of a forfeiture for a subsequent breach, although merely a continuance of the original breach; and where the covenant was to repair within a reasonable time, and after breach the lessor received rent, it was held that he might bring ejectment immediately afterwards. S. C. And, it seems that if an act of waiver take place on one day, the landlord may sue out a writ for a continuing breach on the next day. *Price v. Worwood*, 4 H. & N. 512, *per Cur.* Though the breach may be a continuing one (e.g., user as a shop without licence), yet if it has been continued for 20 years with knowledge of the lessor, a licence will be presumed, and neither lessor nor his assignee can re-enter. *Gibson v. Doeg*, 2 H. & N. 615; 27 L. J., Ex. 37. The waiver of a forfeiture incurred by underletting, does not prevent re-entry for a subsequent underletting to another person. *Doe d. Boscawen v. Bliss*, 4 Taunt. 735. But where a condition not to assign, underlet, or permit any person to occupy any part of the premises without the consent of the plaintiffs, has been broken by a letting to T. for one year, and the forfeiture has been waived, T.'s remaining in occupation for the remainder of the year does not create a further forfeiture. *Walrond v. Hawkins*, L. R., 10 C. P. 342. A covenant to *put* premises in repair is not a continuing covenant. *Coward v. Gregory*, L. R., 2 C. P. 153. Nor is one, to build a house. *Jacob v. Down*, (1900) 2 Ch. 156. *Secus*, as to a covenant to keep a house in repair when built. S. C.

Except by deed, there could not at law be any dispensation with a performance of a covenant, so as to prevent the lessor taking advantage of a forfeiture by a subsequent breach. *Doe d. Muston v. Gladwin*, 6 Q. B. 962; and *Doe d. Knight v. Rowe*, Ry. & M. 343, is not to the contrary, for there the landlord had misled the tenant by delivering to him a deficient abstract of the lease, and he was therefore held precluded by his own act from enforcing the forfeiture. It was, however, otherwise in equity, as where under a provision of the lease the lessor gave the lessee a notice to repair in six months, a negotiation between them, for purchase by the lessor of the lessee's interest, was held to operate as a suspension of the running of the time comprised in the notice. *Hughes v. Metropolitan Ry. Co.*, 1 C. P. D. 120, C. A.; 2 Ap. Ca. 439, D. P. See also *Birmingham, &c. Land Co. v. L. & N. W. Ry. Co.*, 40 Ch. D. 268, C. A.

By the 23 & 24 V. c. 38, s. 6, where any actual waiver of the benefit of any covenant or condition in any lease on the part of the lessor, his heirs, &c., shall be proved to have taken place after July 23rd, 1860, in any one particular instance, such actual waiver shall not be assumed nor deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear. The object of this provision is to avoid the effect of the decision in *Dumport's case*, 4 Rep. 119, cited *ante*, p. 1031.

As to the confirmation of leases made under powers defectively exercised, *vide ante*, p. 1011.

[*Relief from forfeiture.*] Where the forfeiture is for non-payment of rent, the tenant (see *Moore v. Smee*, (1907) 2 K. B. 8, C. A.), by C. L. P. Act, 1852, s. 212, may stop the proceedings by tendering or paying into court the rent and costs. And even where the landlord has peaceably re-entered without action, the lessee may obtain relief under this section by action. *Howard v. Faushaue*, (1895) 2 Ch. 581. By the C. L. P. Act, 1860, s. 1, on ejectment

for forfeiture for non-payment of rent, the court or a judge has power upon motion or summons, to give relief in a summary manner (but subject to appeal) up to and within the like time after execution executed, and subject to the same terms and conditions as to payment of rent, costs, and otherwise, as in the Court of Chancery; and if the lessee, his executors, &c., shall be relieved, they shall hold the demised lands according to the lease without any new lease. As to the necessary parties to an application under this section, see *Hare v. Elms*, (1893) 1 Q. B. 604; *Humphreys v. Morton*, (1905) 1 Ch. 739. Relief may be given hereunder to a sub-lessee against forfeiture of the superior lease, but more conveniently, under 55 & 56 V. c. 13, s. 4, *infra*, see *Gray v. Bonsall*, (1904) 1 K. B. 601, C. A. By the Conveyancing and Law of Property Act, 1881 (44 & 45 V. c. 41), s. 14 (2), where a lessor is proceeding by action or otherwise, to enforce a right of re-entry, or forfeiture, under any proviso or stipulation in a lease for a breach of covenant or condition in the lease, "the lessee may in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section" (*vide ante*, p. 1029) "and to all the other circumstances, thinks fit; and in case of relief, may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit." Sub-sects. 3—6, 9, as modified by 55 & 56 V. c. 13, ss. 2 (2), 5 (*ante*, pp. 1030, 1029), define the leases and conditions to which this sub-sect. applies; it does not apply to relief in case of non-payment of rent (sub-sect. 8). Sub-sect. 2 applies only where the landlord has not re-entered. *Rogers v. Rice*, (1892) 2 Ch. 170, C. A.

Sub-sect. 2 did not entitle the under-lessee of part of the premises comprised in the lease, in the forfeiture of which the action was brought to obtain relief. *Burt v. Gray*, (1891) 2 Q. B. 98, following *Creswell v. Davidson*, 56 L. T., 811, E. S. 1887, Kay, J.; *accord. Nind v. Nineteenth Century Building Society*, (1894) 2 Q. B. 226, C. A. Now, however, by the Conveyancing and Law of Property Act, 1892 (55 & 56 V. c. 13), s. 4, "Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof either in the lessor's action (if any) or in any action brought by such person for that purpose make an order vesting for the whole term of the lease or any less term the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in such property upon such conditions, as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the court in the circumstances of each case shall think fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease." Application may be made under this section by an under-lessee by defence and counterclaim in an action by the lessor for possession. *Cholmeley's School (Wardens, &c. of) v. Sewell*, (1893) 2 Q. B. 254. This section is independent, and relief may be given to the under-lessee when it could not have been given to the lessee. *Id. v. Id.*, (1894) 2 Q. B. 906; *Inray v. Oakshette*, (1897) 2 Q. B. 218, C. A.; *Gray v. Bonsall*, (1904) 1 K. B. 601, C. A. See further as to the terms of relief, S. C.; *Ewart v. Fryer*, (1901) 1 Ch. 499, C. A.

By sect. 2.—(1.) "A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any) all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor

and surveyor or valuer or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor by writing under his hand, or from which the lessee is relieved, under the provisions of the Conveyancing and Law of Property Act, 1881, or of this Act." An under-lessee is not a "lessee" within sect. 2 (1). *Nind v. Nineteenth Century Building Soc.*, (1894) 2 Q. B. 226, C. A. A lessee is not "relieved" within the meaning of this sub-section unless he has obtained relief against a forfeiture from the court. *Id.* 233, *per* Ld. Esher, M.R., and Davey, L.J. Where he has repaired within a reasonable time, there is no forfeiture, *per* *Id.*

A condition against underletting without the consent of the lessor, B., which was not to be arbitrarily withheld in the case of a respectable and responsible person, was broken by the grant of an under-lease to a proper person, but without asking for, or obtaining B.'s consent; the under-lease was prepared by the solicitor of the lessee I., who did not look at I.'s lease, and forgot it contained the covenant; B. had sustained no injury; it was held that the omission to ask B.'s consent was not a mistake, which would entitle I. to equitable relief against the forfeiture. *Barrow v. Isaacs*, (1891) 1 Q. B. 417, C. A.; *accord. Eastern Telegraph Co. v. Dent*, (1899) 1 Q. B. 835, C. A.

Action for Recovery of Land by Heir-at-Law.

The law collected under this heading applies only to cases in which the ancestor died before Jan. 1st, 1898. Under the Land Transfer Act, 1897 (60 & 61 V. c. 65), s. 1, where he has died on or after that day, his freehold land vests in his personal representative R., as if it were a chattel real, and the heir-at-law can only claim it under the conveyance which R. may make to him under sect. 3. See these sections, *post*, pp. 1060, 1061. The evidence in this case will be the same as if the executor or administrator were suing, *vide post*, pp. 1060, 1061, in addition to the deed of conveyance, as to the proof of which, *vide ante*, pp. 135 *et seq.*

Where the plaintiff claimed as heir-at-law, he must, at common law, have proved that the ancestor from whom he claims was actually seised of the land; or, if he claimed as heir to a remainderman, that his ancestor was the person in whom the remainder first vested by purchase; *Ratcliff's case*, 3 Rep. 42 a; Watk. on Desc. 120; and also that he was heir to such ancestor. The necessity of this proof is founded on the rule of law *seisina facit stipitem*; but the 3 & 4 W. 4, c. 106, has altered this rule in all descents taking place since 1833.

By sect. 2, in every case descent shall be traced from the *purchaser*; and the person *last entitled* to the land shall be considered to have been the purchaser, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited, shall be considered to have been the purchaser, unless it shall be proved that he inherited the same.

By sect. 1, the act extends to all hereditaments, corporeal or incorporeal, freehold, copyhold, or customary, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, whether in possession, reversion, remainder, or contingency; and "purchaser" means the person who last acquired the land otherwise than by descent, &c.; and the "person last entitled" extends to the last person who had a right to the land, whether he did or did not obtain the possession or receipt of the rents and profits.

By sect. 1, when any one shall acquire land by purchase under a limitation to the heirs or heirs of the body of any of his ancestors, in any assurance executed after the 31st December, 1833, or in any will of a testator dying after that day, the land shall descend and the descent be traced as if the ancestor had been the purchaser.

By sect. 10, an heir may trace his descent through an attainted person who died before the descent took place, unless the land escheated in consequence of the attainder before 1st January, 1834.

In consequence of a decision in the case of the grandchild of a foundling, *Doe d. Blackburn v. Blackburn*, 1 M. & Rob. 547, a provision has been made by 22 & 23 V. c. 35, s. 19, that, where there shall be a total failure, of heirs of the purchaser, or where land shall be descendible as if an ancestor had been purchaser, and there is a total failure of his heirs, the land shall descend and the descent be traced from the person last entitled, as if he had been purchaser.

Proof of seisin.] Actual possession, or receipt of the rent from the person in possession, is *prima facie* evidence of seisin in fee. Co. Litt. 15 a; B. N. P. 103; *Jayne v. Price*, 5 Taunt. 326. So is payment of the costs of repairs and building. *Doe d. Loscombe v. Clifford*, 2 Car. & K. 448. The possession of a tenant for years gives an actual seisin to the owner of the inheritance. Co. Litt. 243 a; *Bushby v. Dixon*, 3 B. & C. 298. So in the case of the lease of a jetty erected on the foreshore. *Van Dieman's Land Co. v. Table Cape, &c. Board*, (1906) A. C. 92, J. C. So, the possession of guardian in socage confers an actual seisin upon the infant. *Goodtitle v. Newman*, 3 Wils. 516. Evidence of shooting and appointing a gamekeeper by the lord of a manor is not properly referable to a right of soil; *per* Payley, J., *Tyrwhitt v. Wynne*, 2 B. & A. 560; though it is evidence that the locus is within the limits of the manor. *Doe d. Gore v. Langton*, 2 B. & Ad. 680. Holding courts and appointing keepers is proof of the existence and seisin of a manor. *Doe d. Beck v. Heakin*, 6 Ad. & E. 495; see *ante*, p. 50, and the cases there cited. And as the presumption from mere possession is that of seisin in fee, the declaration of a deceased person, shown to have been then in occupation, or in receipt of the rents, that he held under A. B., being against interest, is admissible, to prove the seisin of A. B., though offered in evidence against a stranger by a party claiming under A. B. *Doe d. Daniel v. Coulthred*, 7 Ad. & E. 235; *Peaceable d. Uncle v. Watson*, 4 Taunt. 16; *Carme v. Nicoll*, 1 N. C. 430; see *ante*, pp. 55 *et seq.* See *Bulley v. Bulley*, L. R., 9 Ch. 739.

Proof of descent.] The plaintiff must give some evidence that there is no intermediate heir between himself and the ancestor under whom he claims. *Richards v. Richards*, 15 East, 294, n. It is, however, sufficient evidence for the jury, if he prove that he has not by reasonable inquiries been able to discover any such heir; *Greaves v. Greenwood*, 2 Ex. D. 289, C. A.; or even that no such heirs have made any claim. *Lyell v. Kennedy*, 18 Q. B. D. 796, 811, C. A., not affected on this point by the judgment in D. P., 14 Ap. Ca. 437. See further, *Doe d. Banning v. Griffin*, 15 East, 293, and *Doe d. Oldham v. Wolley*, 8 B. & C. 22, cited *ante*, p. 41. In ejectment by a son, his heirship has been proved as matter of reputation by a person who has known the plaintiff's family for 20 years, and who always knew the plaintiff as his father's eldest son. *Bridger v. Huett*, 2 F. & F. 35. Evidence by one of the family that one of the immediate parties went abroad, and was reputed to have died there, and that the witness had never heard of his being married, is *prima facie* evidence that the party is dead without issue. *Doe d. Banning v. Griffin*, *supra*. As to the presumption of the duration of life, and of death

without issue, see *ante*, p. 41. If the plaintiff claim as collateral heir, he must prove the descent of himself and the person last seised from a common ancestor; or at least from two brothers or sisters; *Roe d. Thorne v. Lord*, 2 W. Bl. 1099; for the descent between brothers and sisters was immediate; *Id.*; *Kynnaird v. Leslie*, *infra*; but this is now altered by 3 & 4 W. 4, c. 106, s. 6, in the case of descents taking place after 31st December, 1833. Proof of births, marriages and deaths has already been noticed to some extent, *ante*, pp. 125 *et seq.*, 217, 218. For other evidence usually adduced in cases of pedigree, see *ante*, *tit. Hearsay*, pp. 44 *et seq.*; *Herald's books*, p. 214.

Proof of marriage.] The law of marriage, as regards the personal capacity of the spouses depends upon the law of the country of their domicile; but the validity of the ceremony depends *at common law*, upon the law of the country where it takes place. *Sottomayor v. De Barros*, 3 P. D. 1, C. A.; *Scott v. Att.-Gen.*, 11 P. D. 128. See further *Brook v. Brook*, 9 H. L. C. 193; *In re De Wilton*, *post*, p. 1043, and *In re Bozell's Settlement*, (1902) 1 Ch. 751. As to the statutory ceremony abroad as regards spouses where one of them is a British subject, *vide post*, pp. 1045, 1046. A marriage in England between foreigners one of whom only is domiciled here, is valid here, if it would have been valid between domiciled English persons. *Sottomayor v. De Barros*, 5 P. D. 94; *Ogden v. Ogden*, (1907) P. 107. The succession to real property is regulated by the *lex loci rei sitæ*; but where the foreign law of marriage is repugnant to the fundamental principles of the *lex fori*, or when contrary to religion or sound morality, the doctrine of the comity of nations is not to be followed. *Fenton v. Livingstone*, 3 Macq. 497. Marriage throughout Christendom is, in its essence, "the voluntary union for life of one man and one woman to the exclusion of all others," and no other union, where-soever formed, is recognized here as marriage. Thus, neither a Mormon marriage contracted at Utah, U. S.; *Hyde v. Hyde*, L. R., 1 P. & M. 130; nor a Baralong marriage in Bechuanaland; *In re Bethell*, 38 Ch. D. 220; is recognized here. It was indeed held sufficient to constitute a good marriage in Japan, that the husband could not marry another wife, *while the marriage subsisted*. *Brinkley v. A.-G.*, 15 P. D. 76. *Sed quære?* for it did not appear that the union was *for life*; *vide supra*. As to domicile, see *Udny v. Udny*, 1 H. L. Sc. 441, and cases there cited; and *Platt v. New S. Wales A.-G.*, 3 Ap. Ca. 336, J. C.; *Doucet v. Geoghegan*, 9 Ch. D. 441, C. A.; *In re Marrett*, 36 Ch. D. 400, C. A.; *In re Grove*, 40 Ch. D. 216, C. A.; *In re Craignish*, (1892) 3 Ch. 180, C. A.; *In re Martin*, (1900) P. 211, C. A.; *Winans v. A.-G.*, (1904) A. C. 287, D. P.; *Huntly, Mchss. of, v. Gaskell*, (1906) A. C. 56, D. P. As to a marriage of necessity, see *Ruding v. Smith*, 2 Hagg. Cons. Rep. 371, 391; *Armitage v. Armitage*, L. R., 3 Eq. 343.

An attainted person can contract a valid marriage, and the children are legitimate. *Kynnaird v. Leslie*, L. R., 1 C. P. 389.

Proof of marriage—By reputation, &c.] Marriage may be proved by reputation. *Reed v. Passer*, Peake, 303; 1 Esp. 213; B. N. P. 114; *R. v. Wilson*, 3 F. & F. 119; *Campbell v. Campbell*, L. R., 1 H. L. Sc. 182; *Lyle v. Ellwood*, L. R., 19 Eq. 98; *De Thoren v. Att.-Gen.*, 1 Ap. Ca. 686, D. P.; *Neo v. Neo*, L. R., 6 P. C. 381, 386; *In re Shephard*, (1904) 1 Ch. 456. Even where the parents are alive, proof that the mother was received in society as the wife of the father is, in ejectment by the son, sufficient evidence of the marriage. *Doe d. Fleming v. Fleming*, 4 Bing. 266.

Marriage may be also *prima facie* proved by a witness who was present, and it is not necessary in the first instance to prove that the proper preliminary formalities were gone through, for the presumptive proof of marriage was not

altered by the Marriage Acts. *S. Derwent v. Much Dew Church*, 1 W. Bl. 367; B. N. P. 114; *Reed v. Passer*, ante, p. 1038; *Lauderdale Peerage*, 10 Ap. Ca. 693. Either of the alleged married parties is competent to prove or disapprove the marriage; *Goodright v. Moss*, Cowp. 593; and so, after their decease, their declarations are admissible for this purpose. S. C.; *Murray v. Milner*, 12 Ch. D. 845.

The most frequent course of *prima facie* proof of a marriage is by the official registers; *vide ante*, pp. 125, 217, 218, with some evidence of the identity of the parties; *vide ante*, pp. 125, 135.

Such is the usual and less formal evidence of marriage; but occasions still arise, especially in suits for establishing a title by descent, in which it is necessary to inquire into the strict and formal requisites of a legal marriage. For this purpose the necessary forms of marriage at different times, and under different circumstances, will be explained in the following paragraphs.

Proof of marriage, before 26 G. 2, c. 33.] Before the Marriage Act, 26 G. 2, c. 33 (1754), a marriage by sufficient words of present espousal (*per verba de presenti*) constituted a binding marriage. See *Lautour v. Teesdale*, 8 Taunt. 830; 2 Marsh. 243; and the cases there cited. The presence of a priest in holy orders was, however, essential at common law. *R. v. Millis*, 10 Cl. & F. 534. In this case the House of Lords was equally divided, but *in favorem negantis* the judgment of the Irish Q. B., which, by the withdrawal of the junior judge's judgment, had formally decided that a marriage before a dissenting minister was invalid, was affirmed. This case in the Irish Q. B. is separately reported by Smythe and Bourke, and also by Dix. In *Beamish v. Beamish*, 9 H. L. C. 274, 338, 339, it was held that the authority of *R. v. Millis*, *supra*, was as binding as if it had been a unanimous decision of the House. It was so regarded by Parke, B., in *Catherwood v. Caslon*, 13 M. & W. 261, 264; see also *Culling v. Culling*, (1896) P. 116; but in *R. v. Manwaring*, 1 Dear. & B. 132, 139; 26 L. J., M. C. 10, 13, Willes, J., said he did not consider the case a binding authority. See further on this subject, 2 Roper, Husband and Wife, 2nd ed., pp. 445 *et seq.*

Proof of marriage, under 26 G. 2, c. 33.] 1st. Hardwicke's Marriage Act, 26 G. 2, c. 33 (1754), put an end to irregular marriages, and required certain forms to be adopted in English marriages, whether by banns or licence; and this act continued in force until the act 3 G. 4, c. 75, which partly repealed it, and thence until 4 G. 4, c. 76 (1st Nov. 1823), which wholly repealed it.

When the marriage took place under stat. 26 G. 2, c. 33, s. 1, in a chapel, it was necessary to prove that it was a chapel in which banns had been usually published at the time of the passing of the act. *R. v. Northfield*, 2 Doug. 659. And where a register of marriages, going back to the year 1578, and a register of the publication of banns from the year 1754 (when the act passed), were produced from the chapel royal in the Tower, it was held sufficient evidence upon which to found a presumption that banns had usually been published before the act in that chapel. *Tuunton v. Wyborn*, 2 Camp. 297.

Marriages in chapels erected and consecrated since 26 G. 2, c. 33, were rendered valid by various retrospective statutes; see 21 G. 3, c. 53; 44 G. 3, c. 77; 48 G. 3, c. 127; 6 G. 4, c. 92; 14 & 15 V. c. 97, s. 25; and 24 & 25 V. c. 16, s. 4. And by these statutes the registers, or copies of the registers, of such marriages are to be received in evidence. By 6 G. 4, c. 92, s. 2, it was made lawful for marriages to be *in future* solemnized in all chapels and churches erected since the passing of 26 G. 2, and consecrated, in which churches and chapels it had been customary and usual, before the passing of that act (6 G. 4), to solemnize marriages; and, by sect. 3, the registers of such marriages, or copies thereof, are declared to be evidence.

Under the 26 G. 2, c. 33. where the banns were published in wrong names of the parties, and there was no evidence to show that they had ever been known by such names, the marriage was held void. *Mather v. Ney*, 3 M. & S. 265, n.; see also *Stanhope v. Baldwin*, 1 Addams, 93; *Green v. Dalton*, *Id.* 289. So, where a wrong name was fraudulently assumed for the purpose of the marriage. *Frankland v. Nicholson*, 3 M. & S. 259, n.; *Fellowes v. Stewart*, 2 Phillim. 257; *Meddowcroft v. Gregory*, *Id.* 365. The rules on the subject of banns were thus laid down by Ld. Tenterden, C.J., in *R. v. Tibshelf*, 1 B. & Ad. 195: "First, if there be a total variation of a name or names,—that is, if the banns are published in a name or names totally different from those which the parties, or one of them ever used, or by which they were ever known,—the marriage, in pursuance of that publication, is invalid, and it is immaterial in such cases whether the misdescription has arisen from accident or design, or whether such design be fraudulent or not. But, secondly, if there be a partial variation of name only, as the alteration of a letter or letters, or the addition or suppression of one christian name, or the names have been such as the parties have used, and been known by at one time and not at another, in such case the publication may or may not be void; the supposed misdescription may be explained, and it becomes a most important part of the inquiry, whether it was consistent with honesty of purpose, or arose from a fraudulent intention. It is in this class of cases only that it is material to inquire into the motive of the parties." A licence in a wrong name, not fraudulently assumed, was held not to avoid a marriage. *Lane v. Goodwin*, 4 Q. B. 361.

Proof of marriage, under 4 G. 4, c. 76; 6 & 7 W. 4, c. 85, &c.] By the stat. 4 G. 4, c. 76 (the act in force for marriages according to the rites of the Church of England, after 1st November, 1823), s. 2, "All banns of matrimony shall be published in an audible manner in the parish church, or in some public chapel in which chapel banns of matrimony may now or may hereafter be lawfully published, of or belonging to such parish or chapelry wherein the persons to be married shall dwell according to" the rubrick; and by sect. 3, "the bishop of the diocese, with the consent of the patron and the incumbent of the church of the parish in which any public chapel, having a chapelry thereunto annexed, may be situated, or of any chapel situated in an extra-parochial place, signified to him under their hands and seals respectively, may authorize by writing under his hand and seal the publication of banns and the solemnization of marriages in such chapel, for persons residing within such chapelry or extra-parochial place respectively; and such consent, together with such written authority, shall be registered in the registry of the diocese." As to the presumption that the building, where the service was performed, had been duly registered, see *R. v. Cresswell*, 1 Q. B. D. 446.

By the 6 & 7 W. 4, c. 85, s. 26, the bishop may, with the consent of patron and incumbent of a parish or a district church (or, in certain cases, without such consent), license under his hand and seal the celebration of marriages in any public chapel in the parish or district, or in any chapel licensed for divine service, or any chapel, the minister whereof is duly licensed to officiate therein, according to the rites of the Church of England. Sect. 34 provides for the making of annual lists of such licensed chapels. And, by 7 W. 4 & 1 V. c. 22, s. 33, the words, "Banns may be published, and marriages may be solemnized, in this chapel," are to be placed in a conspicuous part of the inside of the chapel. By 7 & 8 V. c. 56, s. 2, the bishop's certificate shall be conclusive evidence that marriages may be lawfully solemnized therein. Whether the certificate proves itself, and requires no proof of signature or seal, or whether the certificate may be proved by an examined or certified copy, is not provided by the Act; but

see the Evidence Acts, 8 & 9 V. c. 113, s. 1, and 14 & 15 V. c. 99, s. 11, *ante*, pp. 100, 101.

By 4 G. 4, c. 76, s. 10, no licence is to be granted except for the church or chapel belonging to the parish or chapelry where one of the persons shall have had his usual place of abode for the fifteen days preceding; which licence by sects. 14, 16, is not to be obtained without consent of the father or guardian of a minor; but a marriage, without such consent, is not invalid. *R. v. Birmingham*, 8 B. & C. 29. And by sect. 26, the validity of a marriage under this act, whether by banns or licence, cannot be impeached by proof, after its celebration, of the non-residence of parties within the proper parish or chapelry. By sect. 22, marriages *under this Act* will be null and void if the parties knowingly and wilfully intermarry in a place not a church or public chapel wherein banns may be published (unless by special licence); or knowingly and wilfully intermarry without due publication of banns or licence; or knowingly and wilfully consent to, or acquiesce in, a marriage by a person not in holy orders. The language of this act differs from the old marriage act, and only avoids the marriage where *both* parties knowingly contravene its provisions. *R. v. Wroxton*, 4 B. & Ad. 640; there the intended husband procured the banns to be published in a christian and surname which the woman had never borne, but without her knowledge, and it was held a valid marriage. *Templeton v. Tyree*, L. R., 2 P. & M. 420, and *Greaves v. Greaves*, *Id.* 423, are to the like effect. But where the banns are, with the knowledge of both parties, published in a false name, there is an undue publication which avoids the marriage, and it is immaterial whether the names are altered or suppressed. *Wiltshire v. Prince*, 3 Hag. Ecc. R. 332; *Midgely v. Wood*, 30 L. J., P. M. & A. 57; *Wormald v. Neale*, 19 L. T. 93. By 49 & 50 V. c. 3, a marriage is not invalid by reason that the banns of one of the parties who was resident in Scotland have been published or proclaimed there in Scotch form.

By the 6 & 7 W. 4, c. 85, s. 1 (amended by 7 W. 4 & 1 V. c. 22, s. 36, and 19 & 20 V. c. 119), a registrar's certificate obtained under that act is made equivalent to banns, and will warrant celebration of marriage according to the rites of the Church of England. As to the effect of such certificate, *vide post*, p. 1042.

It would seem that where a marriage in a parish church is shown to have been celebrated with the usual forms, and by a person acting as minister, this is presumptive evidence of a regular and legal marriage without the aid of any statute. See *R. v. Manwaring*, *post*, p. 1042, and cases therein cited.

The marriage must be by a clergyman who is a third person, and not the bridegroom himself. *Beamish v. Beamish*, 9 H. L. C. 274.

Marriage of dissenters.] Under the preceding acts there was no exception as to the marriage of dissenters (other than of Jews or Quakers); but the 6 & 7 W. 4, c. 85, provides means of legal marriage for dissenters and others. Under sect. 4, notice may be given by one of the parties to a superintendent registrar, who, under sect. 7, is to grant a certificate enabling the parties to be married in a building registered under the act, or in his offices; under sect. 11 he may grant licences for the same purpose.

Sects. 18, 19, provide for the registration of meeting-houses. By sects. 20, 21, marriages may be performed in such registered meeting-houses in the presence of *some registrar of the district* (*vide post*, p. 1042) and two witnesses, or at the office and in the presence of the superintendent registrar, and *some* registrar of the district and two witnesses, in either case the form of words given in sect. 20 is to form part of the ceremony.

By sect. 42, if any person shall knowingly and wilfully intermarry in any

place other than the church, chapel, registered building, office, or other place specified in the notice and certificate required by act, or without due notice to the superintendent registrar, or without certificate of notice duly issued, or without licence when a licence is necessary under the act, or in the absence of a registrar or superintendent registrar when his presence is necessary, the marriage shall be null and void; Provided that nothing therein shall annul a marriage solemnized under the Marriage Act, 4 G. 4, c. 76, *ante*, pp. 1040, 1041. By the Marriage Act, 1898 (61 & 62 V. c. 58), s. 4, the presence of the registrar is not necessary where a person duly authorized under that act is present; by sect. 6, the name and address of the person so authorized with respect to the particular building must be certified to the registrar-general. Marriages under these acts are to be registered, and the registers and certified copies are admissible in evidence. See *Proof of registers*, *ante*, pp. 126, 127.

It has been held that there is no analogy between the certificate of the registrar and banns; and the marriage will not be void if the certificate be obtained by a misstatement which would have avoided a marriage by banns. *Holmes v. Simmons*, L. R., 1 P. & M. 523. But the contrary was assumed in *R. v. Rea*, L. R., 1 C. C. 365, where it was held that a marriage was not avoided by a misstatement in the notice given to the registrar not known to both parties, on the ground that 6 & 7 W. 4, c. 85, s. 42, must receive the same construction as that placed on 4 G. 4, c. 76, s. 22 (*ante*, p. 1041), in reference to banns.

Where the marriage took place under this act in the presence of a superintendent registrar in a dissenters' meeting-house, it was held to be presumed that the meeting-house was duly registered for marriages. *R. v. Manwaring*, 1 Dear. & B. 132; 26 L. J., M. C. 10. So, proof that a marriage was solemnized in a Roman Catholic chapel, according to the rites of that Church, and that the parties afterwards cohabited, is *prima facie* evidence to show a valid marriage under the act; as it will be presumed that the chapel was registered pursuant to sect. 18, and that the registrar was present as required by sect. 20. *Sichel v. Lambert*, 15 C. B., N. S. 781; 33 L. J., C. P. 137.

The 6 & 7 W. 4, c. 85, has been amended by the 7 W. 4 & 1 V. c. 22, the 3 & 4 V. c. 72, and the 19 & 20 V. c. 119. By sect. 17 of the last act, after a marriage has taken place under any of these acts, proof of residence in the district stated in the notice; of consent of third persons; that the building has been certified as registered; or that it is either of the parties' usual place of worship, is unnecessary; and proof to the contrary in any proceedings touching the validity of the marriage shall not be given. This provision obviates the doubts expressed in *R. v. Manwaring*, *supra*. By sect. 24, cited *ante*, p. 127, certified copies of the registration of the building may be given in evidence.

Marriage of Quakers and Jews.] The Marriage Acts, 26 G. 2, c. 33, and 4 Geo. 4, c. 76, do not extend to marriages amongst *Quakers or Jews*, where both parties are Quakers or Jews (see *Jones v. Robinson*, 2 Phill. Ecc. Cas. 285), such marriages being expressly excepted. By 6 & 7 W. 4, c. 85, ss. 2, 4, marriages of Quakers and Jews, according to their usages, are to be good if both parties are Quakers or Jews respectively, and notice be given to the registrar of the intended marriage, and a certificate be issued by the registrar agreeably to the provisions of that act. See also 3 & 4 V. c. 72, s. 5. The stat. 10 & 11 V. c. 58, removed doubts that existed as to the validity of marriages amongst Quakers and Jews, solemnized before 1st July, 1837, according to their usages, by enacting that such marriages "were and are good in law," provided both parties were Quakers or Jews respectively. By

the 23 V. c. 18, amended by 35 & 36 V. c. 10, the provisions of 6 & 7 W. 4, c. 85, and the Irish Act, 7 & 8 V. c. 81, are extended to cases where only one or neither of the parties is a member of the "Society of Friends," provided the party giving notice to the registrar shall declare that both parties are members of, or shall profess with or are of the persuasion of the Society, or shall produce a certificate from the registering officer of the Society that the party is authorized to proceed with the marriage according to the usages of the Society.

If the plaintiff be a Quaker, the marriage must be proved to have taken place according to the ceremonies of that sect. 1 Hag. Con. App., 9 n.; *Deane v. Thomas*, M. & M. 361. In order to prove a Jewish marriage (in support of a plea of coverture) two witnesses were called, who swore they were present at the marriage in the synagogue; but upon an objection made that what took place at the synagogue was merely a ratification of a previously written contract, and that, as that contract was essential to the validity of the marriage, it ought to be produced and proved, the contract was put in. *Horn v. Noel*, 1 Camp. 61. As to the form of the Jewish contract, see *Lindo v. Belisario*, 1 Hag. Con. 225, 247, App. p. 9, and *Goldsmid v. Bromer*, 1 Hag. Con. 324.

The above acts relate to the formalities of the marriage only, the capacity to contract follows the law of England; thus a marriage abroad between two Jews domiciled here, is invalid if they are within the prohibited degrees, although it is good in the country of the marriage and by Jewish law. *In re De Wilton*, (1900) 2 Ch. 481.

Marriage of Greeks.] By the Greek Marriages Act, 1884 (47 & 48 V. c. 20), the Probate and Matrimonial Division may, on petition, declare certain irregular marriages between members of the Greek Church to be valid.

Marriage abroad.] The Marriage Acts, above mentioned, do not extend to marriages abroad, and a marriage celebrated abroad according to the law of the foreign state is generally recognized in this country as a valid marriage. In proving a foreign marriage, evidence must be given of the law of the foreign state. See *Fenton v. Livingstone*, 3 Macq. 497; *Hyde v. Hyde*, *Brinkley v. Att.-Gen.*, and *Armitage v. Armitage*, cited *ante*, p. 1038. As to the proof of foreign law, see *ante*, pp. 120 *et seq.*

Marriage in Scotland.] A marriage in Scotland between English subjects according to the Scotch law is good in our courts. *Dalrymple v. Dalrymple*, 2 Hag. Con. 54; *Harford v. Morris*, *Id.* 430. In order to establish the fact of a marriage in Scotland, it is necessary that some person, conversant with the law of Scotland as to marriage, should be called. *R. v. Povey*, Dearsley, 32; 22 L. J., M. C. 19. See further *ante*, pp. 120, 121, and *Patrickson v. Patrickson*, L. R., 1 P. & M. 86; *Campbell v. Campbell*, *Lyle v. Ellwood*, and *De Thoren v. Att.-Gen.*, cited *ante*, p. 1038, where irregular Scotch marriages were on the evidence, presumed to have taken place. By stat. 19 & 20 V. c. 96, s. 1, "After the 31st of December, 1856, no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony, shall be valid, unless one of the parties had, at the date thereof, his or her usual place of residence there, or had lived in Scotland for 21 days next preceding such marriage." It is insufficient under this section to live in Scotland for 19 days and fractions of two other days prior to the marriage. *Lawford, f. c. Davies v. Davies*, 4 P. D. 61. By sect. 2, irregular marriages contracted after that day may be registered,

and the certified copies are admissible in evidence. See *Proof of registers*, ante, pp. 127, 128.

Marriage in Ireland.] The marriage law in Ireland conforms to the general marriage law of England before the act 26 G. 2, c. 33, *vide ante*, p. 1039, but has been modified by acts applicable to Ireland. See especially 3 & 4 W. 4, c. 102, and 7 & 8 V. c. 81; 26 & 27 V. c. 27; 33 & 34 V. c. 110, Part II.; and 36 & 37 V. c. 16, which extend to marriages according to the rites of the Church of Ireland, and to marriages by Roman Catholics, and by Dissenters. A marriage in Ireland by a clergyman of the Church of England, in a private room was, before the 7 & 8 V. c. 81, came into operation, good. *Smith v. Maxwell*, Ry. & M. 80. The Irish Act, 21 & 22 G. 3, c. 25, renders legal marriages of dissenters by dissenting ministers. A marriage in 1835, by a non-placed Presbyterian minister, who had previously had a congregation, but had been suspended, and ceased to have one, is valid. *Harris v. Harris*, 1 R., 3 C. L. 294, Ex. But, apart from statute, such a marriage was void. *R. v. Millis*, 10 Cl. & F. 534, cited ante, p. 1039. By 7 & 8 V. c. 81, s. 32, which is incorporated with the latter acts, proof of residence of the parties, or of consent, &c., is not necessary for the purpose of establishing the marriage. That act provides for the registration of all marriages, and certified copies are to be evidence. See *Proof of registers*, ante, pp. 127, 128.

Marriage abroad in British dominions.] A marriage between British subjects in a British settlement is valid, if it be such a marriage as would have been valid in this country before the passing of the Marriage Act, 26 G. 2, c. 33, ante, p. 1039; or, be in conformity with any local law established by competent authority. Thus a marriage between two Protestant British subjects, solemnized by a Roman Catholic priest at Madras and followed by cohabitation, but without the licence of the governor (which it had been the uniform custom to obtain, though there was no law requiring it), was held valid. *Lautour v. Teesdale*, 8 Taunt. 830; 2 Marsh. 243. So, in the case of *R. v. Brampton*, 10 East, 282, Ld. Ellenborough was of opinion that, where the parties had accompanied the king's forces abroad, they might be considered to have carried with them the law of England, and that therefore a marriage, according to the English forms in a public chapel by a person apparently a priest, was valid. And now see 4 G. 4, c. 91, s. 1, and 55 & 56 V. c. 23, s. 22, post, pp. 1045, 1046. The presence of a priest in holy orders was essential to a good marriage at common law. *R. v. Millis*, 10 Cl. & F. 534; see remarks on this case, ante, p. 1039. And accordingly a marriage celebrated by a missionary, not in holy orders, but otherwise according to the rites of the English church, in a foreign country, was held not even *primâ facie* evidence to support an action for adultery. *Catherwood v. Caslon*, 13 M. & W. 261.

The stat. 14 & 15 V. c. 40, provided for the solemnization of marriages in India before registrars, where one or both of the parties professed Christianity. By sect. 13, proof of residence or consent was not necessary in order to establish such a marriage, nor could any evidence be given to prove the contrary. Sect. 21 enacted that the act was not to affect marriages solemnized in India by persons in holy orders. The provisions of this act relating to the registration of marriages will be found *sub tit. Proof of registers*, ante, p. 128. The act was repealed by the Stat. Law Rev. Act, 1875, and the Indian law of marriage is now regulated by Indian acts.

The Foreign Marriage Act, 1892 (55 & 56 V. c. 23), s. 11 (2), post, p. 1046, which empowers a secretary of state by a marriage warrant to

authorize a governor, &c., to be a marriage officer, enacts that the act shall then apply to a marriage before a governor, &c., and in such application shall not be limited to places outside her Majesty's dominions. *Id. (c)*.

By 28 & 29 V. c. 64, s. 1, it is enacted, that, "every law made or to be made by the legislature of any" of her Majesty's possessions abroad "for the purpose of establishing the validity of any marriage or marriages contracted in such possession, shall have and be deemed to have had from the date of the making of such law the same force and effect for the purpose aforesaid within all parts of her Majesty's dominions, as such law may have had or may hereafter have within the possession for which the same was made: provided that nothing in this law contained shall give any effect or validity to any marriage unless at the time of such marriage both of the parties thereto were, according to the law of England, competent to contract the same."

Marriage abroad out of British dominions.] The marriage of English subjects by a priest of the Church of England in the chapel of the English ambassador abroad appears to have been always held valid; see *R. v. Brampton*, ante, p. 1044, even although the marriage might be invalid according to the law of the foreign country. *Este v. Smyth*, 18 Beav. 112; 23 L. J., Ch. 705. So, such marriage on board a man-of-war on a foreign station is good. *Culling v. Culling*, (1896) P. 116. And the stat. 4 G. 4, c. 91, s. 1, reciting that "it is expedient to relieve the minds of all his majesty's subjects from any doubt concerning the validity of marriages solemnized by a minister of the Church of England in the chapel or house of any British ambassador or minister, residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory, as well as from any possibility of doubt concerning the validity of marriages solemnized within the British lines by any chaplain or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad," . . . "declared and enacted" . . . "that all such marriages as aforesaid shall be deemed and held to be as valid in law as if the same had been solemnized within his Majesty's dominions with a due observance of all forms required by law." This act rendered the marriage valid, although one party were not a British subject. *Re Wright's Trust*, 2 K. & J. 595, 613; 25 L. J., Ch. 621, 631. A marriage within the British lines is valid, although the commanding officer had not authorized its celebration. *Wuldegrave Peerage*, 4 Cl. & F. 649. This act was repealed so far as related to marriages above referred to in italics, solemnized on or after January 1st, 1891, by stat. 53 & 54 V. c. 47, s. 12, and was entirely repealed by the 55 & 56 V. c. 23, s. 26. See substituted provisions in *Id.* s. 1, *infra*, and sect. 26 (2), *post*, p. 1046.

By the Foreign Marriage Act, 1892 (55 & 56 V. c. 23, s. 1), "All marriages between parties of whom one at least is a British subject solemnized in the manner in this act provided in any foreign country or place by or before a marriage officer within the meaning of this act shall be as valid in law as if the same had been solemnized in the United Kingdom with a due observance of all forms required by law." By sect. 8 (2), "Every such marriage shall be solemnized at the official house of the marriage officer" (*vide* sect. 24, *post*, p. 1046, "with open doors, between the hours of" 8 a.m. and 3 p.m., "in the presence of two or more witnesses, and may be solemnized by another person in the presence of the marriage officer, according to the rites of the Church of England, or such other form and ceremony as the parties thereto see fit to adopt, or may, where the parties so desire, be solemnized by the marriage officer."

By sect. 11, the marriage officer is authorized by a marriage warrant given by a secretary of state, or by an Order in Council under sect. 21, *infra*. By sect. 11 (2), the marriage warrant may be given to a British ambassador, or consul, or to a governor, high commissioner, resident, consular or other officer; and by sect. 11 (3), if it "refers to the office without designating the name of any particular person holding the office, then, while the warrant is in force, the person for the time being holding or acting in such office shall be a marriage officer."

Sect. 12. "A marriage under this act may be solemnized on board one of her Majesty's ships on a foreign station, and with respect to such marriage—(a) subject to the marriage regulations a marriage warrant of a secretary of state may authorize the commanding officer of the ship to be a marriage officer; (b) the provisions of this act shall apply with the prescribed modifications."

By sect. 13 (1), after the marriage, proof of residence and consent of necessary parties is dispensed with, and negative evidence excluded; so (2) where a marriage purports to have been solemnized and registered under this act in the official house (*vide* sect. 24, *infra*) of a British ambassador or consul, or on board one of H.M.'s ships, proof of the authority of the marriage officer is dispensed with and negative evidence excluded. By sect. 16 (2) "a certificate of a secretary of state as to any house, office, chapel, or other place being or being part of the official house of a British ambassador or consul shall be conclusive."

Sect. 21 empowers the making, by Order in Council, of regulations for restricting the powers given by the act (*vide supra*) to marriage officers, and otherwise for applying and carrying out the purposes of the act. An order has been made under this section, dated Oct. 28th, 1892. See *London Gazette*, Nov. 4th, 1892, p. 6161.

These marriages are to be registered, and copies of the registers are admissible in evidence. See *sub tit. Proof of registers, ante*, pp. 129–131.

As to the registration under sect. 18, by a marriage officer of a marriage solemnized abroad in accordance with the local law, *vide ante*, p. 130.

By sect. 22, "It is hereby declared that all marriages solemnized within the British lines by any chaplain or officer or other person officiating under the orders of the commanding officer of a British army serving abroad, shall be as valid in law as if the same had been solemnized within the United Kingdom, with a due observance of all forms required by law." See *Waldegrave Peerage, ante*, p. 1045.

By sect. 24, the expression "'official house of a marriage officer' means, subject to the provisions of the marriage regulations, the office at which the business of such officer is transacted and the official house of residence of such officer, and in the case of any officer who is an officer for solemnizing marriages in the official house of an ambassador, means the official house of the ambassador."

This act, by sect. 26, repeals the earlier statutes as to marriages by consuls, viz., the Consular Marriage Acts, 1849, 1868 (12 & 13 V. c. 68; 31 & 32 V. c. 61); the Marriage Act, 1890 (53 & 54 V. c. 47), and the Foreign Marriage Act, 1891 (54 & 55 V. c. 74), with the proviso that (2) "Every marriage in fact solemnized and registered by or before a British consul or other marriage officer in intended pursuance of any act hereby repealed shall, notwithstanding such repeal or any defect in the authority of the consul or the solemnization of the marriage elsewhere than at the consulate, be as valid as if the said act had not been repealed, and the marriage had been solemnized at the consulate by or before a duly authorized consul;" unless the marriage had been declared invalid before June 27th, 1892, by any competent court, or

either of the parties thereto had before that day lawfully intermarried with any other person.

The stat. 42 & 43 V. c. 29, s. 2, legalizes all marriages between two British subjects solemnized before 21st July, 1879, on board a Queen's vessel on a foreign station, in the presence of her commanding officer, whether according to any religious rite, or contracted *per verba de presenti*.

A marriage solemnized in France under and subject to the conditions of 55 & 56 V. c. 23, *ante*, p. 1045, is valid here as regards form, even although the French court has declared the marriage void, owing to non-compliance with the forms required by French law. See *Hay v. Northcote*, (1900) 2 Ch. 262, decided on 12 & 13 V. c. 68. See further Chitty's Statutes, title "Marriage."

Defences.] In ejectment by heir-at-law the most common defences are illegitimacy and a will.

Proof of illegitimacy.] The defendant may prove that the marriage was invalid, and the plaintiff therefore illegitimate.

To prove the illegitimacy of a child born in wedlock, want of access or other circumstances which tend to show that the husband could not, in the course of nature, have been the father of his wife's child, are good evidence. *R. v. Luffe*, 8 East, 204; where see *Ld. Ellenborough's* judgment, and the cases cited. And presumptive evidence of non-access is admissible. *Goodright d. Thompson v. Saul*, 4 T. R. 356; *Morris v. Davies*, 5 Cl. & F. 163; *Hawes v. Drueger*, 23 Ch. D. 173; *Aylesford Peerage*, 11 Ap. Ca. 1. But whenever a husband and wife are proved to have been together, at a time when, in the order of nature, the husband might have been the father of the child, sexual intercourse is to be presumed, and it is incumbent on those who dispute the legitimacy of the child to disprove the fact of such intercourse, by evidence affording an irresistible inference that it could not have taken place, and not by mere evidence of circumstances which may afford a balance of probabilities against the fact; *per* Leach, M.R., *Heid v. Heid*, 1 Sim. & Stu. 152; *Turn. & R.* 138; and see *Banbury Peerage*, 1 Sim. & Stu. 153; *Morris v. Davies*, *supra*; *Bosville v. Att.-Gen.*, 12 P. D. 177; *Burnaby v. Baillie*, 42 Ch. D. 282; *Legge v. Edmonds*, 25 L. J. Ch. 125; if a husband had access, or the access be not clearly negatived, and others at the same time were carrying on a criminal intercourse with his wife, a child born under such circumstances is legitimate. S. C.; *R. v. Mansfield*, 1 Q. B. 444; *Gordon v. Gordon*, (1903) P. 141. But if the husband and wife are living separately, the mere fact that the husband had opportunity of access, is not conclusive evidence of access, and therefore of legitimacy. *Cope v. Cope*, 1 M. & Rob. 269; *per* Alderson, J., explained in *R. v. Mansfield*, 1 Q. B. 450, 452. And where the wife is judicially separated from her husband, her children born more than nine months after the decree are, in the absence of evidence of access, to be deemed bastards. See *Inter S. George & S. Margaret*, 1 Salk. 123; *Hetherington v. Hetherington*, 12 P. D. 112; and *ante*, p. 566.

As to the presumption as to the duration of gestation, *vide ante*, p. 42; and as to the admissibility of evidence to prove the possibility of a protracted period, *vide ante*, p. 52.

Neither husband nor wife will be permitted to prove, directly or indirectly, the non-access *during marriage*, on the ground of public policy. *R. v. Sourton*, 5 Ad. & E. 180. See *Legge v. Edmonds*, *supra*. This rule is not affected by the stat. 32 & 33 V. c. 68, s. 3, *ante*, p. 164. *In re Rideout's Trusts*, L. R., 10 Eq. 41; *Nottingham, Guardians of v. Tomkinson*, 4 C. P. D. 343; *Burnaby v. Baillie*, *supra*. The rule does not, however, exclude the evidence of the husband as to non-access *before* the marriage, to prove that he was not the father of the child of his wife born shortly after it.

Poulett Peerage, (1903) A. C. 395, overruling *Anon. v. Anon.*, 22 Beav. 481; 23 Beav. 273; 25 L. J., Ch. 136, n. See as to declarations of parents, *ante*, pp. 46, 47.

As to the admissibility of a bastardy order to prove illegitimacy, see *Watson v. Little*, 5 H. & N. 472; 29 L. J., Ex. 267, cited *ante*, pp. 109, 207.

The issue of an Englishman domiciled in Scotland, born in Scotland before marriage, and made legitimate by subsequent marriage there, cannot inherit real estate in England. *Doe d. Birtwhistle v. Vardill*, 5 B. & C. 438; 6 N. C. 385, D. P.; see also 2 Cl. & F. 571. So, the father under the same circumstances cannot inherit from the son, under 3 & 4 W. 4, c. 106; *In re Don*, 4 Drew. 194; 27 L. J., Ch. 98.

With respect to the question of illegitimacy it is sometimes material to consider how far an English marriage can be dissolved by the sentence of a foreign court. In *R. v. Lolley*, R. & Ry. 237, 239, the twelve judges were unanimously of opinion that "no sentence or act of any foreign country or state could dissolve an English marriage, *à vinculo matrimonii*, for ground on which it was not liable to be dissolved" in England. But, the resolution above stated must be construed with reference only to the facts of that case, for "the tribunal of a foreign country having jurisdiction to dissolve the marriages of its own subjects, is competent to pronounce a similar decree between English subjects who were married in England, but who before, and at the time of the suit are permanently domiciled within the jurisdiction of such foreign tribunal, such decree being made in a *bonâ fide* suit without collusion or concert;" *per* Ld. Westbury, in *Shaw v. Gould*, L. R., 3 H. L. 55, 85. This is in accordance with Dr. Lushington's remarks in *Conway v. Beazley*, 3 Hagg. Ecc. Rep. 639. The principle applies to a decree of nullity on the ground of impotence, as until such decree the marriage is voidable only, *vide A. v. B. infra*, and the wife had acquired her husband's domicile. *Turner v. Thompson*, 13 P. D. 37. And a divorce by a Scotch court of domiciled Scotch persons, for cause insufficient for divorce in England is valid here, although the marriage was solemnized in England, with an English woman. *Harvey v. Farnie*, 8 Ap. Ca. 43, D. P.; *Pemberton v. Hughes, infra*. So even where, at the time of the marriage, the spouses were both domiciled in England. *Bater v. Bater*, (1906) P. 209, C. A. See also *Scott v. A.-G.*, 11 P. D. 128. And mere irregularity in procedure in the foreign court will not invalidate the divorce if the court had jurisdiction and the proceedings afforded substantial justice. *Pemberton v. Hughes*, (1899) 1 Ch. 781, C. A. See also *Bater v. Bater, supra*. But, in general unless the parties are *bonâ fide* domiciled in the foreign country, and the suit is prosecuted without collusion, a divorce *à vinculo*, in the case of an English marriage between English subjects, has no effect in England. *Shaw v. Gould*, L. R., 3 H. L. 55; and see also *Briggs v. Briggs*, 5 P. D. 163; *Green v. Green*, (1893) P. 89, and the cases collected in the argument and judgments in *Shaw v. Gould, supra*, and in *Shaw v. Att.-Gen.*, L. R., 2 P. & M. 156. A divorce, however, recognized as valid by the courts of the country or state of the husband's domicile, although obtained in another state, is valid here. *Armitage v. A.-G.*, (1906) P. 135. Residence without domicile does not give the foreign court jurisdiction. *Le Mesurier v. Le Mesurier*, (1895) A. C. 517, J. C., dissenting from *Niboyet v. Niboyet*, 4 P. D. 1, C. A.; *diss. Brett, L.J.* It must be observed that in each of the above cases, the court decreeing the divorce was that of a Christian country, *vide ante*, p. 1038. As to divorce in India of a domiciled Englishman, see *Warter*, 15 P. D. 152.

As to domicile, see cases cited, *ante*, p. 1038.

It may be here observed that a marriage is, on the ground of impotence, not void, but voidable only; and proceedings to avoid the marriage can be taken only by the other party, and during the lifetime of both the parties. *A. v. B.*, L. R., 1 P. & M. 559. Such proceedings must have been taken in the Ecclesiastical Court, or in the Court for Matrimonial Causes. The jurisdiction

of the latter court, by the J. Act, 1873, s. 34, is transferred to the Probate, Matrimonial and Admiralty Division of the High Court of Justice; and although every judge and division of the court has now power to do complete justice between the parties (see sect. 36, and J. Act, 1875, s. 11), yet it is probable that a question of this kind would be relegated to the above-named division of the court. See *Pimney v. Hunt*, 6 Ch. D. 98; *Bradford v. Young*, 26 Ch. D. 657; the C. A. in affirming the judgment (29 Ch. D. 617) did not consider this point.

By the 21 & 22 V. c. 93 (ss. 1 and 8), any natural-born subject, &c., may petition the Probate, Matrimonial, and Admiralty Division of the High Court of Justice (*vide supra*), and obtain a decree declaring his legitimacy, and that the marriage of his father and mother, or grandfather and grandmother was valid, or that his own marriage was valid; and such decree declaring the legitimacy or validity, or the contrary, shall be binding on any person cited or made a party, and his real or personal representative, or any person claiming title through him.

Proof of a will.] The defendant may defeat the claim of the heir by showing a will. The proof of a will of land has been already treated of, *vide ante*, pp. 144 *et seq.* As to what wills, &c., fall within the provisions of the Wills Act (1 V. c. 26), see sects. 1, 34, *post*, p. 1053.

As to the right to begin at the trial of an ejectment to decide the validity of a will, *vide ante*, pp. 286, 287.

Under the Conveyancing, &c. Act, 1881 (44 & 45 V. c. 41), s. 30, cited *post*, p. 1061, on the death, after Dec. 31st, 1881, of a sole trustee or mortgagee of land in fee simple, the land vests in his legal personal representative, notwithstanding any disposition thereof by will. But by the Copyhold Act, 1894 (57 & 58 V. c. 46), s. 88, *post*, p. 1061, this provision does not apply to land of customary tenure. Freeholds devised by a testator dying after Dec. 31st, 1897, vest in his personal representative notwithstanding any devise thereof, *vide infra*.

Action for recovery of Land by Devisee of a Freehold Interest.

The law collected under this heading applies only to cases in which the testator died before Jan. 1st, 1898. Under the Land Transfer Act, 1897 (60 & 61 V. c. 65), ss. 1, 3, *post*, pp. 1060–1, where he has died on or after that day his freehold estate vests in his personal representative R., notwithstanding any testamentary disposition as if it were a chattel real, and vests in the devisee on assent by R. only. The evidence will in this case be the same as if the land were leasehold: see hereon, *post*, p. 1055.

Where the plaintiff claims a freehold interest by a devise he must prove: (1) The seisin in fee of the testator (see *ante*, p. 1037), or, under 1 V. c. 26, s. 3, that he was "entitled": (2) The regular execution of the will; see *ante*, pp. 144 *et seq.*, or in certain cases, a probate under 20 & 21 V. c. 77, s. 61, *ante*, pp. 150 *et seq.*: (3) the death of the testator: and (4), in case there are any estates limited by the will prior to the devise to himself, the determination of such prior estates.

By 3 & 4 W. 4, c. 106, s. 3, when land, &c., shall be devised by any testator who died since Dec. 31st, 1833, to his own heir, such heir shall be considered as taking by devise and not by descent. Before this act, a devise to any one of the same estate as he would otherwise have taken as heir-at-law of the devisor was inoperative, and the devisee took by descent and not by devise.

A devise of trust or mortgage estates does not take effect in the case of a death after Dec. 31st, 1881: see 44 & 45 V. c. 41, s. 30, *post*, p. 1061.

As to the right to begin, *vide ante*, pp. 286, 287.

As to the admissibility of oral evidence to explain ambiguities in the will, *vide ante*, pp. 29 *et seq.*; and on the question of parcel or no parcel, p. 32.

Defences.] The defendant may show a disclaimer on the part of the plaintiff to take under the will; or he may impeach the will by showing that it was not duly executed; or, that the testator did not know and approve of its contents; or, that it has been obtained by fraud or duress; or, that the devise is an interlineation; or, by proving the incapacity of the testator to make a will; or, a revocation of it.

Disclaimer.] The disclaimer is good if by deed. *Townson v. Tickell*, 3 B. & A. 31; *Begbie v. Crook*, 2 N. C. 70; and see *Nicolson v. Wordsworth*, 2 Swanst. 371, where the earlier cases on disclaimer are collected. And, it is now settled that a valid disclaimer may be made by parol or by conduct. *In re Birchall*, 40 Ch. D. 436, C. A. See also *Shep. Touch.* 452; *per Holroyd, J.*, in *Townson v. Tickell*, *supra*. But, the disclaimer must be absolute of any estate in the land; and therefore where the devisee of an estate refused to take it as devisee, saying he was entitled as heir-at-law, and would not accept any benefit by the will of the deviser, it was held that this was no such disclaimer as prevented him from afterwards bringing ejectment, and relying on his title as devisee. *Doe d. Smyth v. Smyth*, 6 B. & C. 112. Acting as executor or under the trusts of a will, does not affect the power to disclaim real estate devised. *Wellesley, Vt. v. Withers*, 4 E. & B. 750.

Want of knowledge of contents of will.] The defendant may prove that the testator did not know and approve of the contents of the will, so that it is not really his will. *Hastilow v. Stobie*, L. R., 1 P. & M. 64; *Garnett-Botfield v. Garnett-Botfield*, (1901) P. 335; *Fulton v. Andrew*, L. R., 7 H. L. 448. This principle may be applied to a part only of the will. S. C.; *Morrell v. Morrell*, 7 P. D. 68; *In re Boehm*, (1891) P. 247; *Brisco v. Baillie Hamilton*, (1902) P. 234. It is, however, sufficient if the will is prepared in accordance with instructions, though at the time of execution the testator merely recollects that he gave those instructions, and believes that the will is in accordance with them. *Parker v. Felgate*, 8 P. D. 171. *Acc. Perera v. Perera*, (1901) A. C. 354, J. C. And where a testatrix employed T. to convey her meaning in technical language, and executed the will prepared by him, knowing the words used, a mistake made by T. cannot be corrected. *Collins v. Elstone*, (1893) P. 1; *Garnett-Botfield v. Garnett-Botfield*, *supra*. Where a will is executed under suspicious circumstances, the plaintiff must prove that the testator knew and approved its contents. *Tyrrell v. Painton*, (1894) P. 151, C. A., following *Barry v. Butlin*, 2 Moo. P. C. 480, and *Fulton v. Andrew*, *supra*. See further, 1 Wms. Exors. 10th ed. 254, 255.

Fraud and undue influence.] To impeach the will on the ground of fraud, declarations of intention, &c., by the testator are admitted, and similarly such declarations may be proved in support of the will. *Vide ante*, p. 145. Where the inequitable treatment of some children by the will was urged in support of the charge of fraudulent concoction made against the favoured children, a new trial, on the ground of the refusal of the judge to explain to the jury, when requested by them, the legal operation of the will as regarded the children, was refused. *Doe v. Stevens*, Q. B., E. T. 1849, M. S.

A will will not only be void if obtained by fraud, for force, importunity, or undue influence will also avoid it. The question as to what is such influence is well explained by Wilde, J.O., in the case of *Hall v. Hall*, L. R., 1 P. & M. 481, 482, as follows: "To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity

for future destitution, or the like,—these are all legitimate and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven; and his will must be the offspring of his own volition and not the record of some one else's." See further *Parfitt v. Lawless*, L. R., 2 P. & M. 462; *Ashwell v. Lomi*, *Id.* 477, n.; *Wingrove v. Wingrove*, 11 P. D. 81; and 1 Wms. Exors., Pt. I., Bk. II., Ch. 1, § 2, 10th ed. 29 *et seq.*

Fraud or undue influence may be ground for expunging part of a will only. See *Allen v. M'Pherson*, 1 H. L. C. 191.

With regard to imbecility, *vide post*, p. 1052.

Interlineation.] Alterations apparent on the face of the will are, in the absence of evidence to the contrary, to be presumed to have been made after execution. See *Proof of wills of land, ante*, pp. 144 *et seq.* Declarations of the testator made *before* execution are admissible to rebut this presumption, but not those made *after* execution. *Vide ante*, p. 145.

Incapacity from infancy or coverture.] By 34 & 35 H. 8, c. 5, s. 14, an infant under 21 years of age was disqualified from making a will of lands. And by 1 V. c. 26, s. 7, an infant is disqualified from making a will at all. As to when an infant becomes of age, *vide ante*, p. 672. By sect. 8, "no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act." The exception applies to wills made under a power, or where the husband has abjured the realm, or is otherwise civilly dead. Co. Litt. 133 a. As to this last case, see *In re Coward*, 4 Sw. & Tr. 46; 31 L. J., P. M. & A. 120. The exception also includes, in equity, wills of land, which the married woman has to her separate use. *Taylor v. Meuds*, 4 D. J. & S. 597; 34 L. J., Ch. 203; *Cooper v. Macdonald*, 7 Ch. D. 288, C. A.; and by the Married Women's Property Act, 1882, ss. 1 (1), (5), has been extended to all real and personal property, her title to which has accrued after Dec. 31st, 1881. *Vide post*, pp. 1174 *et seq.*, *Actions by and against Married Women alone.*

Incapacity from idiocy, or non-sane memory.] A party propounding a will is bound to show that it was executed by the testator, and that he was of a sound and disposing mind. If a will, not irrational on the face of it, be produced, and the execution of it proved, and no other evidence be offered, the presumption is that it is the will of a person of competent understanding; but, if there be circumstances in evidence tending to counterbalance this presumption, it lies on the party propounding the will to establish affirmatively the competency of the testator. *Sutton v. Sudler*, 3 C. B., N. S. 87; *Synos v. Green*, 1 Sw. & Tr. 401; 28 L. J., P. M. & A. 83; *Cleare v. Cleare*, L. R., 1 P. & M. 655. See *Hope v. Campbell*, (1899) A. C. 1, D. P. It is not enough that the testator, when he makes his will, has sufficient memory to answer familiar and usual questions; he ought to have a disposing memory so as to be able to make a disposition of his lands with understanding and reason. *Winchester's, Ms. of, case*, 6 Rep. 23 a; *Boughton v. Knight*, L. R., 3 P. & M. 64. If the defendant succeed in proving that the testator has been affected by habitual mental derangement, then it is for the other party who claims under the will, to show sanity and competency at the period when the

act was done. *Att.-Gen. v. Parnter*, 3 Bro. Ch. C. 441; *Smith v. Tebbitt*, L. R., 1 P. & M. 398; *Smee v. Smee*, 5 P. D. 84. But, partial unsoundness, not affecting the general faculties, and not operating on the mind of the testator, in regard to testamentary disposition is not sufficient to render him incapable of making a will; *S. C.*; *Banks v. Goodfellow*, L. R., 5 Q. B. 549; *accord. Jenkins v. Morris*, 14 Ch. D. 674, C. A. And, where the case is one of temporary delirium arising from transient causes, as fever, &c., slight evidence of restored sanity will be sufficient. *Brogden v. Brown*, 2 Addams, 445. The will itself may be evidence of a sound mind, or lucid interval; and one made by a person while confined in an asylum, has been established by the reasonableness of its provisions. *M'Adam v. Walker*, 1 Dow, 170, *per* Ld. Eldon, C.; *Cartwright v. Cartwright*, 1 Phillim. 90. Where the evidence is conflicting, the safest course is to try the question by the evidence of collateral facts; as by correspondence, acts done with relation to property, and the circumstances attending the preparation and execution of the will itself. *Tatham v. Wright*, 2 Russ. & Myl. 21, 22; *Smith v. Tebbitt*, *supra*. Letters written to the testator by deceased persons and not acted upon, or indorsed, or answered by him, are not admissible as evidence of his sanity. *Wright v. Doe d. Tatham*, 4 N. C. 489. As to proof of insanity by an inquisition finding lunacy, or by an order of a Master in Lunacy stating unsoundness of mind, *vide ante*, pp. 196, 199.

Imbecility produced by age or sickness, of which the devisee has taken advantage, will be enough to avoid a will. 1 Wms. Exors., 10th ed. 26; *Hucker v. Newborn*, Styles, 427; *Moneyppenny v. Brown*, 8 Vin. Ab. 167. But not mere age or weakness of intellect. 1 Wms. Exors., 10th ed. 26, 27. See further, *Parker v. Felgate*, *ante*, p. 1050.

Revocation of will by cancelling, &c.—*Stat. of Frauds*, s. 6.] By the Stat. of Frauds, s. 6 (repealed by 1 V. c. 26, ss. 2, 34, except as to wills made before Jan. 1st, 1838), a devise in writing, or a clause thereof, may be revoked, “by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his direction and consent.” As to what amounts to a “devise” or “clause,” see *Swinton v. Bailey*, 1 Ex. D. 110, C. A.; 4 Ap. Ca. 70, D. P. The act must be done with an intention of revoking; and though the burning or tearing be incomplete, yet, if done with an intention to revoke, it will operate as a revocation. *Bibb v. Thomas*, 2 W. Bl. 1043; see *Winsor v. Pratt*, 2 B. & B. 650. Where the testator threw his will on the fire in an envelope, with intent to destroy it, and another person snatched it off before more was burnt than the corner of the envelope, and afterwards promised the testator that he would burn the will, and pretended to have done so—this was held no revocation. *Doe d. Reed v. Harris*, 6 Ad. & E. 209. But it was held otherwise in the case of copyhold not being within the Statute of Frauds. *Doe d. Id. v. Id.*, 8 Ad. & E. 1. It is a question for the jury, whether the testator had completed the intended act of revocation; *Doe d. Perkes v. Perkes*, *infra*; or whether, in cases of erasure, the acts were merely deliberative. *Doe d. Strickland v. Strickland*, 8 C. B. 724. The declarations of the testator at the time of doing the act, and his subsequent declarations respecting it, are admissible evidence of his intentions. *Doe d. Perkes v. Perkes*, 3 B. & A. 489. In this case the testator being angry with a devisee tore his will twice through, but his arm being arrested by a bystander, and his anger appeased, he fitted the pieces together and said, “It is a good job it is no worse;” it was left to the jury to say whether the testator had or had not completed the cancelling he at first intended; and the jury having found in the negative, the K. B. upheld their verdict. See also 2 East, 534 (c). If there be several instruments, it is a question for the jury whether they were intended to form but one will; and in the case of

duplicates, if they find they were so intended, an alteration of one instrument found by the jury to have been final, will, in law, be an alteration of the corresponding duplicate, and the will so altered becomes the last will of the testator. *Doe d. Strickland v. Strickland*, *ante*, p. 1052.

Implied revocations were considered as excepted out of the Statute of Frauds; 1 Wms. Saund. 278 c, (4). As to these, see the cases collected in earlier editions of this work, *e.g.*, 16th ed. (1891), p. 1044.

Revocation of will under the Wills Act, 1837.] The Wills Act, 1837 (1 V. c. 26), applies (ss. 1, 34) to any will, codicil, or appointment in exercise of a power made, or re-executed, or re-published, or revived by any codicil, on or after Jan. 1st, 1838.

By sect. 18, a will shall be revoked by marriage, except a will made under a power, when the property would not, in default of appointment, go to the representatives of the testator. See *In re Fenwick*, L. R., 1 P. & M. 319. This section does not apply to the will of a foreigner domiciled abroad. *In re Martin*, (1900) P. 211, *per* Lindley, M.R.

By sect. 19, "no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances."

By sect. 20, no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid (*vide* sect. 18, *supra*), or by another will or codicil executed in the manner required by sect. 9 (*ante*, p. 145); or, by some writing, declaring an intention to revoke, executed in like manner; or, by burning, tearing, or otherwise destroying it, by the testator, or some person in his presence and by his direction, with the intention of revoking the same.

By sect. 23, no conveyance or other act subsequent to the execution of the will (except an act by which a will may be revoked as above) shall prevent the operation of the will with respect to such estate or interest as the testator shall have power to dispose of by will at the time of his death.

By sect. 24, every will shall take effect as if executed immediately before the death of the testator, unless a contrary intention appear by the will. This does not refer to the objects of the testator's bounty, but only to the real and personal estate comprised in the will. *Bullock v. Bennett*, 7 D. M. & G. 283; 24 L. J., Ch. 512.

By sect. 21, no obliteration, interlineation, or alteration made after execution, shall have any effect (except so far as the words or effect of the will before alteration shall not be apparent), unless such alteration be executed in the manner required for a will; but the will, with such alteration, shall be deemed duly executed if the signature of the testator and subscription of the witnesses be made in the margin or on some other part, opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to it, and written at the end or other part of the will. The pasting of strips of paper over part of a will is an obliteration. *In re Horsford*, L. R., 3 P. & M. 211; *Finch v. Combe*, (1894) P. 191. "Apparent" means apparent on the face of the instrument as left by the testator, to experts accustomed to writing, using glasses if necessary, but not chemicals or any physical interference. S. CC. The initials of testator and the witnesses, in the margin of the will, opposite interlineations, are sufficient to give them effect, under this section. As to presumption as to interlineations, see *ante*, p. 145.

By sect. 22, a will revoked can only be revived by re-execution, or by a codicil duly executed and attested and showing an intention to revive it; and when a will partly revoked, and afterwards wholly revoked, shall be revived, the revival shall not extend to so much as was revoked before the revocation of the whole, unless a contrary intention shall be shown. See *In re Steele, May, and Wilson*, L. R., 1 P. & M. 575; *McLeod v. McNab*, (1891) A. C. 471, 474.

The onus of proving the revocation of a duly attested will is on the party alleging it. *Benson v. Benson*, L. R., 2 P. & M. 172. Neither destruction without intention, nor intention without destruction, will revoke a will. *Cheese v. Lovejoy*, 2 P. D. 251, C. A. Where a will was last seen in the testator's own possession, and on his death after due search cannot be found, the presumption is that he had himself destroyed it *animo revocandi*, and it lies on the party relying on the will to rebut this presumption; 1 Wms. Samd. 280 d, (s); *Brown v. Brown*, 8 E. & B. 876; 27 L. J., Q. B. 173; *Eekersley v. Platt*, L. R., 1 P. & M. 281; *Johnson v. Lyford*, *Id.* 546; *Allan v. Morrison*, (1900) A. C. 604, J. C.: and in such case the contents may be proved by parol, in order to show that it revoked a former will. *Brown v. Brown*, *supra*. But, this presumption does not arise where there is evidence that the will was not in existence at the testator's death; *Finch v. Finch*, L. R., 1 P. & M. 371; nor, where the testator after making the will became insane. *Sprigge v. Sprigge*, L. R., 1 P. & M. 608. To rebut this presumption of revocation the declarations of the testator are admissible to show that he had not altered the intention expressed in his will; *Sugden v. Ld. St. Leonards*, 1 P. D. 154, C. A.; *Keen v. Keen*, L. R., 3 P. & M. 105; and this may again be met by evidence of declarations to the contrary. S. C. Such declarations are not admissible to prove revocation by the destruction of one part of a duplicate will. *Atkinson v. Morris*, (1897) P. 40, C. A. It is sufficient cancellation under sect. 20, if the will be found in the testator's custody with the signatures scratched out with a penknife; *In re Morton*, 12 P. D. 141; or cut out, although the piece was gummed in its place again. *Ball v. Fothergill*, L. R., 2 P. & M. 148. So, if the will be so torn as no longer to exist in its entirety; and where a testator noticed in the witnessing clause that he had set his hand and seal to the will, tearing off the seal is a sufficient "tearing" if done with the intention of revoking. *Price v. Powell*, 3 H. & N. 341; S. C. *nom. Price v. Price*, 27 L. J., Ex. 409. So, by a statement in the witnessing clause that he had set his hand to the preceding pages, a testator makes the signature on those pages part of his will; and if he afterwards, *animo revocandi* tear off those signatures, though the formal signature be left, it is a tearing within the section, and a good revocation of the whole will. *Williams v. Tyley*, Johns. 530. The signatures of the attesting witnesses are a material part of the will; and if the will be found in the testator's custody with these signatures torn off, it will be presumed, in the absence of evidence to the contrary, that it was done by the testator *animo revocandi*, and the will is thereby revoked. *Evans v. Dallow*, 31 L. J., P. M. & A. 128. But, where a will is found with the first few lines only, torn off; *In re Woodward*, L. R., 2 P. & M. 206; or the clause appointing executors cut out; *In re Moley*, 12 P. D. 134; that part only which has been removed is cancelled. Where, however, the first three sheets out of five of which the will consisted had been replaced by others, the will was held to be cancelled. *Treloar v. Lean*, 14 P. D. 49; *Leonard v. Leonard*, (1902) P. 243. It is doubtful whether a testator can ratify the cancellation of his will, which took place in his presence but against his wish. *Mills v. Millward*, 15 P. D. 20. See further, cases decided under the Stat. of Frauds, s. 6, *ante*, p. 1052.

In order that a codicil not specifically revoking a will may operate as a revocation of a particular devise in the will, the intention to revoke must be as clear as the original intention to devise. *Doe d. Hearle v. Hicks*, 1 Cl. & F. 20; 8 Bing. 475; *Williams v. Evans*, 1 E. & B. 727; 22 L. J., Q. B. 241; *Robertson v. Powell*, 2 H. & C. 762; 33 L. J., Ex. 34. As to the confirmation by a codicil, of an unattested obliteration in a will, see *In re Hay*, (1904) 1 Ch. 317. Where upon the face of a will, and the facts known to the testator, it is doubtful whether he intended thereby altogether to revoke a former will, oral evidence is admissible as to explain the intention. *Jenner v.*

Ffinch, 5 P. D. 106. But as to how far such evidence is admissible, see *Townsend v. Moore*, (1905) P. 73, 80, *per* Vaughan Williams, L.J.

The cancellation of a will which revoked a devise in an earlier will does not revive the devise. *In re Hodykinson*, (1893) P. 339, C. A. But where a will revoking an earlier one is itself revoked by the testator with the intention of thereby reviving the earlier one, this is a case of dependent relative revocation, and the act of destruction being referable solely to his intention to validate the earlier will, and that act being conditional and the condition unfulfilled, there is no revocation. *Powell v. Powell*, L. R., 1 P. & M. 209; *James v. Shrimpton*, 1 P. D. 431. See *Stamford v. White*, (1901) P. 46. This doctrine may apply even where the document intended to be substituted was non-existent and had never existed as a valid testamentary document, *e.g.* an unexecuted fresh will. *Dixon v. Treasury Solicitor*, (1905), P. 42. So also to alterations made in wills subsequently to execution. *In re Horsford*, L. R., 3 P. & M. 211. In the case where a strip of paper with an altered bequest has been pasted over the former one, the strip may be removed in order to ascertain what the original bequest was. S. C.

A codicil to a will is not now revoked by revocation of the will; it can only be revoked in some of the ways pointed out in sect. 20, *ante*, p. 1053; *Black v. Jobling*, L. R., 1 P. & M. 685; *In re Savage*, L. R., 2 P. & M. 78; even although the codicil is by its language dependent on the will, and cannot be construed without it. *Gardiner v. Courthorpe*, 12 P. D. 14. But where the will and codicil are written on the same paper, it is a question of intention whether cancellation of the will operates as a revocation of the codicil. *In re Bleekley*, 8 P. D. 169.

Action for Recovery of Land by a Devisee of Leasehold.

A devisee of a leasehold interest must prove: 1. The title of the devisor to the property, unless the defendant is estopped from disputing it; 2. The probate of the will, *ante*, p. 118; and, 3. The assent of the executor to the bequest. The devisee of freehold land, where the testator died after Dec. 31st, 1897, must under the Land Transfer Act, 1897, ss. 1, 3, *post*, pp. 1060, 1061, give the same evidence.

By the assent the term is vested in the devisees from the death of the testator. *Saunders's case*, 5 Rep. 12 b; *Doe d. Saye and Sele, Id. v. Guy*, 3 East, 120. A very small matter will amount to an assent, it being a rightful act; *Noel v. Robinson*, 1 Vern. 94; and it is a matter of fact for the jury. *Mason v. Parnell*, 12 M. & W. 674. In the case of a leasehold the assent of one executor is sufficient; and one of several executors can make a valid assent to a devise to himself. *Townson v. Tickell*, 3 B. & A. 40. Assent before probate is good, and even although the executor assenting die without proving the will, provided probate is ultimately taken out. See *Wankford v. Wankford*, 1 Salk. 299, 308; *Brazier v. Hudson*, 8 Sim. 67; and see further, as to assent, *post*, p. 1156; 1 Wms. Exors. 10th ed. 221; 2 *Id.* 1101 *et seq.*; *Elliott v. Elliott*, 9 M. & W. 23; *Quinton v. Frith*, 1 R., 2 Eq. 396; *Hunter v. Hunter*, 1 R., 3 C. L. 40, C. P.; *Thorne v. Thorne*, (1893) 3 Ch. 196; *Stevenson v. Liverpool, Mayor of*, L. R., 10 C. P. 81. Assent to a bequest for life of leaseholds includes, likewise, assent to a bequest thereof in remainder. S. C. Assent as to leaseholds forming part of a residue is good. *Austin v. Beddoe*, (1893) W. N. 78, *cor.* North, J. In the case of freeholds it seems that all the executors, who have not disclaimed, must assent. See the Land Transfer Act, 1897, ss. 1, 2, 3, *post*, pp. 1060, 1061, *In re Parley & L. & Provincial Bank*, *post*, p. 1061, and Brickdale & Sheldon on the Land Transfer Acts, 2nd ed., p. 291. An assent under hand only requires no stamp, *vide ante*, p. 250.

Action for Recovery of Land by Devisee or Heir of Copyhold.

A devisee of copyhold premises must, independently of statutes, adduce the following proofs :

1. The seisin of the testator. The surrender by the testator to the use of his will is no proof of his seisin. *Per* Taunton, J., in *Barfoot v. Sadler*, Winton Sum. As. 1831. The admittance and actual possession of the testator himself would be the best evidence of seisin. And where the testator was a surrenderee, his admittance must be shown. *Matthew v. Osborne*, 13 C. B. 919; 22 L. J., C. P. 241.

2. The surrender by him to the use of his will. But this is not necessary in the case of a person dying after July 12th, 1815; 55 G. 3, c. 192; see *Doe d. Clarke v. Ludlam*, 7 Bing. 275. As to proof of surrender, see *Proof and effect of court rolls and manor books*, ante, pp. 119, 210, and *Stamps,—copyhold estates*, ante, p. 253.

3. The will itself. A recital of it in the admittance is not evidence as between heir and devisee. *Anon.*, B. N. P. 108; 1 Ld. Raym. 735. Nor is the probate admissible evidence of it; *Archer v. Slater*, 11 Sim. 507; except under the provisions of 20 & 21 V. c. 77, ante, pp. 150 *et seq.* Wills of customary and copyhold land must now be executed with the same formalities as freehold; 1 V. c. 26, s. 9, ante, p. 145; and a will so executed is good, though the testator may not have surrendered to the use of his will; and though being entitled as heir, devisee, or otherwise, he may not have been admitted; and though there be no custom, or only a limited custom, to devise or surrender to the use of a will. Sect. 3. Before this act the will need not, it is said, have been in writing. 1 Watk. Copy. 130.

4. The devisee must prove his own admittance, though an heir may bring ejectment without it. *Proof of admittance*, post, p. 1057.

Where the title depends on a special custom, it is necessary to prove the custom; as to which, see ante, pp. 35, 119, 210.

By the Copyhold Act, 1894, 57 & 58 V. c. 46 (replacing 4 & 5 V. c. 35, ss. 86, 88-90), s. 82, a customary court may be held without the presence, or even the existence, of any copyholder; and by sect. 84, the lord, his steward, or deputy steward, may admit out of the manor, and without holding a court; and without a presentment in pursuance of which the admittance is made. By sect. 85, every will a copy of which is delivered to the lord shall be entered on the Court rolls, and the entry shall be as valid as if made in pursuance of a presentment by the homage. But, the act does not make the enrolment evidence of the will. Sect. 100 repeals previous Copyhold Acts, with the proviso that the repeal shall not affect any award, deed, order, certificate, &c., made thereunder.

By sect. 21 (replacing 15 & 16 V. c. 51), after enfranchisement under the act, the customary modes of descent are to cease, and the laws of descent of lands in common socage are to apply; but this provision is not to affect the custom of gavelkind in Kent.

The stat. 3 & 4 W. 4, c. 106 (ante, p. 1036), amending the law of inheritance, extends to copyhold and customary land.

The effect of the stat. 1 V. c. 26, s. 3 (*supra*), is to enable a copyholder to devise his estate in every case, dispensing with a surrender to the use of the will, but leaving the estate in the customary heir till the admittance of the devisee. *Garland v. Mead*, L. R., 6 Q. B. 441. Where, therefore, the devisee does not obtain admittance, but presents the customary heir for admittance, the lord cannot refuse to admit the latter and seize *quousque* for want of a tenant. S. C. See also *Everingham v. Ivatt*, L. R., 8 Q. B. 388; Ex. Ch.

The devise or descent of copyholds is not affected by the Land Transfer Act, 1897 (60 & 61 V. c. 65), see sect. 1 (4); nor by the Conveyancing, &c., Act, 1881 (44 & 45 V. c. 41), s. 30. See the Copyhold Act, 1894 (57 & 58 V. c. 46), s. 88, *post*, p. 1061.

Proof of admittance.] Although in ejectment against a stranger, the *heir* of the copyholder; *Doe d. Tarrant v. Hellier*, 3 T. R. 169; or, the grantee of the reversion of a copyhold from the lord; *Roe v. Loveless*, 2 B. & A. 453; and see *Doe d. Leach v. Whitaker*, 5 B. & Ad. 409; need not prove an admittance; yet a devisee, being a purchaser, must prove it. As to proof of admittance, see *Proof and effect of court rolls and minor books*, *ante*, pp. 119, 210. The identity of the parties named in the rolls must be proved; *Doe d. Hanson v. Smith*, 1 Camp. 197; or the circumstances may be such as to warrant the presumption of identity. *Vide ante*, p. 135. The admittance of tenant for life being the admittance of him in remainder, even though it be a contingent one; *Brown's case*, 4 Rep. 22 b.; a devisee in remainder has only to prove the admittance of the tenant for life, and not his own. The title of a surrenderee is not complete before admittance. *Berry v. Greene*, Cro. Eliz. 349; *Doe d. Shewen v. Wroot*, 5 East, 132; *Rayson v. Adcock*, 9 Jur., N. S. 800; H. T. 1863 Ex. But, after admittance his title has relation to the surrender (or, in case of devisee, to the testator's death), against all persons but the lord; and he may therefore recover in ejectment upon a title laid between the time of the surrender and admittance, provided the admittance be before the trial. *Holdfast d. Wooliams v. Clapham*, 1 T. R. 600; *Doe d. Bennington v. Hall*, 19 East, 208. An heir might, before admittance, devise copyholds descending to him. *King v. Turner*, 1 Myl. & K. 456. But, not an unadmitted devisee or surrenderee. *Doe d. Winder v. Lawes*, 7 Ad. & E. 211, 213, *per Cur*; *Matthew v. Osborne*, 13 C. B. 919; 22 L. J., C. P. 241, *ante*, p. 1056; but now see 1 V. c. 26, s. 3, *ante*, p. 1056. Where an admittance was entered at a void court, and the proceedings of that court regularly entered by the steward on the court rolls, it was held sufficient; as at the following court the tenants would have information of it. *Doe d. Leach v. Whitaker*, *supra*. An admittance at a court baron is good if it be a court at which customary tenants, as well as freeholders, have been used to do suit. *Doe d. Evans v. Walker*, 15 Q. B. 28; 19 L. J., Q. B. 293. The heir of a copyholder, admitted for life or lives only, cannot support an action without admittance, although by the custom he has a descendible right of renewal as *heir*. *Doe d. Dand v. Thompson*, 13 Q. B. 670.

Action for Recovery of Land by Mortgagor.

If the action be brought against the mortgagor in possession after default, or against a tenant let in by him after the mortgage, the mortgagee has only to prove the execution of the mortgage deed, and a demand of possession is unnecessary. *Keech v. Hall*, 1 Doug. 21; 1 Smith's L. C. (where see notes); *Doe d. Roby v. Maisey*, 8 B. & C. 767; *Doe d. Fisher v. Giles*, 5 Bing. 421. And the mere fact of the receipt of interest, as such, since the date of the writ, is no recognition of a lawful possession by the mortgagor or his tenant, so as to make a demand necessary; *Doe d. Rogers v. Cadwallader*, 2 B. & Ad. 473; even though received under a distress, if the distress were made under a special power in the mortgage deed. *Doe d. Wilkinson v. Goodier*, 10 Q. B. 957. But, if the mortgagee treat, as his tenant, one who occupies under a demise by the mortgagor since the mortgage, a notice to quit may become necessary. *Rogers v. Humphreys*, 4 Ad. & E. 313, 314; *Doe d. Whittaker v. Hales*, 7 Bing. 322. A. let B. into possession as tenant from year to year, and then mortgaged to plaintiff; after the mortgage B. let the

defendant into possession, and informed A., the mortgagor, of the fact, and A. afterwards received the rent from defendant; it was held, that the tenancy of B still existed, and the plaintiff could not maintain ejectment without a proper notice to quit. *Cadle v. Moody*, 30 L. J., Ex. 385. As to estoppel by conduct of the mortgagee, against the tenants of the mortgagor, see *Keith v. Gancia (R.) & Co.*, (1904) 1 Ch. 774, C. A.

Notice by a mortgagee, to the mortgagor's tenant in possession, to pay the rent to him, will not *alone* create a tenancy between them without attornment. *Evans v. Elliot*, 9 Ad. & E. 342; *accord. Tower-son v. Jackson*, (1891) 2 Q. B. 484, C. A. The mere fact that the notice was not repudiated, is no evidence of such tenancy. S. C. overruling *Brown v. Storey*, 1 M. & Gr. 117, and *Underhay v. Read*, 20 Q. B. D. 209, in Q. B. D. Payment of rent to the mortgagee by the mortgagor's lessee, under an authority given by the mortgagor for that purpose to the mortgagee, makes no change of tenancy, but leaves the lessee still tenant to the mortgagor. *Wheeler v. Branscombe*, 5 Q. B. 373.

A covenant or agreement that the mortgagor shall continue to hold till a certain day fixed for payment operates as a re-demise till that day. *Wilkinson v. Hall*, 3 N. C. 508. So, where the agreement is to hold till default in payment of an annuity; *Doe d. Lyster v. Goldwin*, 2 Q. B. 143. But see *contra, Doe d. Parsley v. Day*, *Id.* 147; and it seems that, in order to make a re-demise, there must be an *affirmative* covenant that the mortgagor shall hold for a *determinate* time; and that where either of these elements is wanting, there is no re-demise. 1 Smith's L. C. 11th ed. 533; see also *Id.* p. 544. Where it was agreed that the mortgagor should, during his occupation, pay rent to the mortgagee, provided such reservation should not prejudice the mortgagee's right to enter and evict upon default, it was held that the mortgagee might eject without notice to quit, though he had distrained for a year's rent. *Doe d. Garrod v. Olley*, 12 Ad. & E. 481. As to the construction of mortgage deeds in which are clauses creating a tenancy between the mortgagor in possession and the mortgagee, see *Metropolitan Counties, &c. Society v. Brown*, 4 H. & N. 428; 28 L. J., Ex. 340, and cases cited *post*, p. 1083. Where the mortgagor has, after the mortgage, leased for years, by deed, and then joined in a conveyance by the mortgagee to A., who receives rent from the tenant, there is no estoppel so as to prevent A. from treating the tenant as only a tenant from year to year, and ejecting him after notice. *Doe d. Downe, Id. v. Thompson*, 9 Q. B. 1037.

If a third person be in possession by a title prior to the mortgage, the mortgagee is the assignee of the reversion only, and must show a title to oust him. Thus, if he be a tenant from year to year who came in prior to the mortgage, the plaintiff must prove a regular notice to quit. See also *Birch v. Wright*, 1 T. R. 380-1. But the defendant, being either the mortgagor or one claiming under him, cannot himself set up a title in a third person prior to the mortgage; *Doe d. Ogle v. Vickers*, 4 Ad. & E. 782; and trustees for public purposes are not exempt from the doctrine of estoppel, so as to set up an earlier mortgage by themselves. *Doe d. Levy v. Horne*, 3 Q. B. 757.

Under the Conveyancing, &c. Act, 1881 (44 & 45 V. c. 41), s. 18 (1, 13), a mortgagee in possession, who has mortgaged after Dec. 31st, 1881, has, unless a contrary intention is expressed in the mortgage deed or otherwise in writing, as against every incumbrancer, power, under certain conditions, to make a lease. Such lease binds the mortgagee as though he were a party to it. *Wilson v. Queen's Club*, (1891) 3 Ch. 522. See also *Brown v. Peto*, (1900) 2 Q. B. 653, C. A. The mortgagee may, on giving notice to the tenant that he intends to exercise such rights, enforce the covenants and

conditions of such lease; *Municipal, &c. Building Soc. v. Smith*, 22 Q. B. D. 70, C. A.; and he is not bound by any collateral agreement between the mortgagor and tenant. S. C. As to vesting of the mortgaged estate on the death of a sole mortgagee, *vide post*, p. 1061.

A mortgagee of turnpike tolls cannot recover in ejectment, unless the power to mortgage includes land, such as toll-houses and gates. *Fairtitle d. Mytton v. Gilbert*, 2 T. R. 169. As to ejectment by mortgagees of tolls under the General Turnpike Act (3 G. 4, c. 126), see *Doe d. Thompson v. Lediard*, 4 B. & Ad. 137; *Doe d. Watton v. Penfold*, 3 Q. B. 757. In order to prove the execution of the mortgage by the trustees of the turnpike road, it is enough under that act to show that the trustees acted as such, and that there was an order for their appointment, without showing the formal appointment under the local act. *Doe d. Baggatey v. Hurcs*, 4 B. & Ad. 435. By 13 & 14 V. c. 79, s. 5, a mortgagee of turnpike tolls is not to enter into possession so long as the interest on his debt is paid within one month after it becomes due; and by 17 & 18 V. c. 58, s. 5, trustees are not to mortgage tolls without the consent of a Secretary of State.

A power given to a railway company to mortgage "the undertaking with all tolls," &c., will not enable the mortgagee to recover the railway by ejectment. *Doe d. Myatt v. S. Helen's Ry. Co.*, 2 Q. B. 364. See *Gardner v. L. Chatham & Dover Ry. Co.*, L. R., 2 Ch. 201, 385.

In ejectment by mortgagee against the assignee (under the Lords' Act, 32 G. 2, c. 28) of an insolvent mortgagor, a letter written by the mortgagor to the plaintiff before the assignment was evidence against the defendant; and it shall be presumed to have been written at the time of its date. *Goodtitle d. Baker v. Milburn*, 2 M. & W. 853.

By 37 & 38 V. c. 42, s. 42 (replacing 6 & 7 W. 4, c. 32, s. 5), in the case of mortgages given to building societies, established under that act, an endorsement, as provided by the act, on the mortgage deed of the repayment of the money, vacates the mortgage debt, and operates as a reconveyance of the estate. So, in the case of friendly societies under 38 & 39 V. c. 60, by s. 16 (7). See on these sections *Fourth City, &c. Soc. v. Williams*, 14 Ch. D. 140; *Harvey v. Municipal Building Soc.*, 26 Ch. D. 273, C. A.

As to the effect of the Statute of Limitations, 3 & 4 W. 4, c. 27, in the case of mortgages, see *post*, *Defence*, pp. 1075, 1076; and stat. 7 W. 4 & 1 V. c. 28, and the Real Property Limitation Act, 1874, there cited.

The C. L. P. Act, 1852, ss. 219, 220, enable mortgagors to stop ejectment by payment of principal, interest, and costs.

Action for Recovery of Land by Execution Creditor.

Tenant by *elegit* must prove: 1. The judgment; 2. The *elegit* issued upon it; and, 3. The inquisition and return thereupon. B. N. P. 104. The return must be filed at the Central Office. *Johns v. Pink*, (1900) 1 Ch. 296, 307.

An examined copy of the judgment roll, containing the award of *elegit* and the return of the inquisition, is sufficient, without proving a copy of the *elegit* and of the inquisition. *Ramsbottom v. Buckhurst*, 2 M. & S. 565. But, the original writ of *elegit*, duly returned, would seem to be admissible, though there be no award of it on the judgment roll. *Pack v. Turpley*, 9 Ad. & E. 468; where a writ of *sequestrari facias* was held evidence against the execution debtor, though no award of it appeared on the judgment roll. Execution creditors, by the 1 & 2 V. c. 110, s. 11, are entitled to *all* the debtor's lands, and the sheriff's return need no longer describe the lands taken by metes and bounds, but only so as to identify them. *Sherwood v.*

Clark, 15 M. & W. 764. If a third person be in possession of the land extended, it is sufficient to prove a *prima facie* title in the debtor, and it lies upon the tenant in possession to show a title anterior to the judgment. *Doe d. Evans v. Owen*, 2 C. & J. 71. But now see 63 & 64 V. c. 26, s. 2 (1), *infra*. It seems that the inquisition is conclusive as against the judgment debtor, and he cannot set up the title of a third person. *Martin v. Smith*, 27 L. J., Ex. 317.

The Land Charges Act, (1900) 63 & 64 V. c. 26, by sect. 5, repeals 27 & 28 V. c. 112, s. 1, and by sect. 2 (1) enacts that a judgment or recognizance shall not operate as a charge on land or on any interest in land unless or until a writ or order for the purpose of enforcing it is registered under the Lands Charges Registration and Searches Act, 1888, 51 & 52 V. c. 51, s. 5, and the registration must be renewed every five years to keep the writ, &c., in force. *Id.* And *Id.* s. 6 [except proviso (a), repealed by 63 & 64 V. c. 26, s. 5], is by *Id.* s. 3, extended to all writs, &c., affecting land.

Where the judgment creditor cannot obtain delivery of his creditor's land under an *elegit*, because the legal estate is outstanding, he may obtain an order in the action for a receiver. *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275, C. A. So where for any other reason the appointment of a receiver is the most convenient remedy. *In re Pope*, 17 Q. B. D., 743, C. A. The order may be made even although no *elegit* has issued. *Ex pte. Evans*, 13 Ch. D. 252, C. A. See also *Salt v. Cooper*, 16 Ch. D. 544.

Where the plaintiff is vendee of a term under a *fi. fa.*, it is sufficient for him, in ejectment against the execution debtor, to produce the *fi. fa.* without proving the judgment. *Doe d. Batten v. Murless*, 6 M. & S. 110. *Aliter*, as against a stranger. *Lake v. Billers*, 1 Ld. Raym. 733; *Martyn v. Podger*, 5 Burr. 2631. And where the sheriff's vendee is also the plaintiff at whose suit the writ was issued, and not a mere stranger, in ejectment against the execution debtor, he must prove the judgment, for he is privy to it, and, if there be none, the writ, as far as he is concerned, would be a nullity. *Doe d. Bland v. Smith*, Holt, N. P. 589; 2 Stark. 199 (by the court in banc). A sale by the sheriff without a written assignment passes no property, and the estate remains to the debtor, who may therefore eject the creditor in possession. *Doe d. Hughes v. Jones*, 9 M. & W. 372.

Action of Recovery of Land by Executor or Administrator.

The Land Transfer Act, 1897 (60 & 61 V. c. 65), in order to carry out its object of establishing a "Real Representative" (see full title), enacts by sect. 1 (1), "Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him. (2) This section shall apply to any real estate over which a person executes by will a general power of appointment, as if it were real estate vested in him."

(4) "The expression 'real estate,' in this part of this act, shall not be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant." These last words include a copyhold tenant. *In re Somerville & Turner's Contract*, (1903) 2 Ch. 583.

(5) "This section applies only in cases of death after the commencement of this act;" Jan. 1st, 1898, see sect. 25.

By sect. 2 (2), all enactments and rules of law relating to the effect of probate, &c., as regards chattels real, and as regards dealing with them before

probate, &c., and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if it were a chattel real vesting in them, "save that it shall not be lawful for some or one only of several joint personal representatives without the authority of the Court to sell or transfer real estate."

By sect. 3 (1), "At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise"

The Conveyancing, &c. Act, 1881 (44 & 45 V. c. 41), s. 30 (repealing and replacing 38 & 39 V. c. 87, s. 48), is similar in terms to 60 & 61 V. c. 65, s. 1 (1), *ante*, p. 1060, so far as relates to an estate or interest of inheritance, or limited to the heir as special occupant, in any tenement or hereditament, corporeal or incorporeal, vested on any trust, or by way of mortgage, in any person solely, where the person died after Dec. 31st, 1881. As to its effect where there is no personal representative, see *In re Pilling's Trusts*, 26 Ch. D. 432.

By the Copyhold Act, 1894 (57 & 58 V. c. 46), s. 88 (replacing 50 & 51 V. c. 73, s. 45, in the same terms), 44 & 45 V. c. 41, s. 30, *ante*, p. 1061, "shall not apply to land of copyhold or customary tenure vested in any tenant on the court rolls of any manor upon any trust or by way of mortgage." In the case of a death between Dec. 31st, 1881, and Sept. 16th, 1887, see *In re Mills' Trusts*, 37 Ch. D. 312; *affirm.* on another ground, 40 Ch. D. 14, C. A.

In ejectment by an executor, or administrator, the plaintiff must prove—1. The title of his testator; 2. The testator's death; 3. The probate or grant of administration.

Where the testator died before Jan. 1st, 1898, the title must be a leasehold one. This may be shown by producing and proving the lease in the usual way. *Vide ante*, pp. 131 *et seq.* As to what is sufficient secondary evidence of a lease, see *Mellers v. Brown*, 1 H. & C. 686; 32 L. J., Ex. 138.

The death of the termor or freeholder is proved by oral evidence, or by proof of the register of death, burial, or burning; *vide ante*, pp. 125 *et seq.*, 217; and identity of the party deceased; *ante*, pp. 125, 135. The probate or letters of administration are not of themselves evidence of the decease. *Ante*, p. 204.

As to proof of the probate or grant of administration, see *ante*, p. 118. And see the enactments in the Probate Court Act (20 & 21 V. c. 77), noticed, *sub tit. Actions by executors and administrators, post*, pp. 1147, 1148.

Administration when granted relates back for some purposes to the intestate's death. Com. Dig. Admon. (B. 10). In Ireland this doctrine of relation was established for the purpose of ejectment by *Patten v. Patten*, Alc. & Nap. 493; cited in *Welchman v. Sturgis*, 13 Q. B. 554; see *Tharpe v. Stallwood*, 5 M. & Gr. 760. In 3 & 4 W. 4, c. 27, s. 6 (*post*, p. 1066), administration is expressly made to relate back to the death for the purposes of that act.

The term is vested in the executor from the death of the testator, and the executor may therefore recover on a writ dated between the time of the testator's death and of the probate. Com. Dig. Admon. (B. 10). So, where the testator died after Dec. 31st, 1897, his freeholds vest in all the executors, who have not disclaimed, whether they have proved the will or not, and to make a conveyance thereof, they must all concur. *In re Pawley & L. & Provincial Bank*, (1900) 1 Ch. 58. As to whether renunciation of probate amounts to a disclaimer, *vide Id.* p. 64, and *Brickdale & Sheldon's Land Transfer Acts*, 2nd ed., p. 275. As to disclaimer, *vide ante*, p. 1050.

The plaintiff in ejectment, claiming as administrator of his mother, had

during her life mortgaged the premises in fee, but it was held that he was not estopped from showing his mother's title as termor. *Metters v. Brown*, ante, p. 1061.

Actions for Recovery of Land by Parson.

In ejectment by a parson for the recovery of the parsonage house, or glebe, where he does not claim in the character of landlord, or where the defendant is not otherwise estopped from disputing his title, he must show his title by proving presentation, institution, and induction, but he need not prove title in the patron. *Snow v. Phillips*, B. N. P. 105; *Heath v. Pryn*, 1 Vent. 14; B. N. P. 105. If the presentation to the bishop were oral, it may be proved by a person who was present and heard it; per Ld. Kenyon, C.J., in *R. v. Eriswell*, 3 T. R. 723. But a presentation by a corporation aggregate must be in writing under the common seal; Gibson's Codex, 794; and must therefore be proved by proof of the seal. *Ante*, p. 131. The institution may be proved by the letters testimonial of institution, or by the official entry in the public registry of the diocese, which ought regularly to record the time of the institution, and on whose presentation; Gibs. 813: in which case it would seem to be evidence of the presentation as well as of the institution. 2 Phillpotts Ev. 7th ed. 311; accord. *Irish Society v. Derry, Bp. of*, 12 Cl. & F. 641; ante, p. 215. So, the letters of institution of a party reciting the cession of his predecessor, followed by induction, are sufficient evidence of the cession. *Doe d. Kerby v. Carter*, Ry. & M. 237. The induction may be proved either by some person who was present at the ceremony, or by the indorsement on the mandate directed by the ordinary to the archdeacon, or by the return to the mandate, if a return have been made. 2 Phillpotts Ev. 311; see *Chapman v. Beard*, 3 Anst. 942. The plaintiff will not be required to prove that he has taken the requisite oaths, or declared his assent to the Book of Common Prayer, according to the Act of Uniformity. *Powel v. Milbank*, 2 W. Bl. 851. Some evidence must be given that the property to be recovered is church property; as that the premises were occupied by a former incumbent, &c. 2 Phillpotts Ev. 312. The parson might formerly have brought ejectment against a tenant from year to year of the glebe land, though the current year of the tenancy created by his predecessor is unexpired, and no notice to quit has been given; *Doe d. Kerby v. Carter*, supra; unless he had impliedly confirmed the tenancy. But by 14 & 15 V. c. 25, s. 1 (cited ante, p. 336), the tenant at rack rent of any farm or lands, is to hold till the expiration of the current year of tenancy, and then quit without notice. It seems that a sentence of suspension *ab officio et à beneficio*, will, so long as it is in force, prevent a parson from maintaining this action. See *Morris v. Ogden*, L. R., 4 C. P. 687, 702, 703. In this case the form of action was trespass.

Defence in Action for Recovery of Land.

As before noticed (ante, p. 998), the J. Acts and Rules thereunder have introduced pleadings in this action: it is, however, provided by Rules 1883, O. xxi. r. 21, that "No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession, and it shall be taken to be implied in such statement that he denies or does not admit, the allegations of fact contained in the plaintiff's statement of claim. He may nevertheless rely upon any ground of defence which he can prove, except as hereinbefore mentioned." Even

under Rules, 1875, O. xix. r. 15, which did not contain the words in italics, it was held that the defendant by pleading only that he is in possession, obliged the plaintiff to prove his title. *Danford v. McAnulty*, 8 Ap. Ca. 456, D. P. Equitable defences are expressly allowed in all actions by J. Act, 1873, s. 24 (2, 3), *ante*, pp. 306, 307. The defendant may, therefore, when he holds under an agreement only for a lease, set it up as an equitable defence, and may also, by way of counterclaim, claim to have it specifically performed; and where the agreement is oral, he may, for the like purpose, rely on part performance, as to which, *vide ante*, pp. 319 *et seq.*

By Rules, 1883, O. xii. rr. 25, 26, any person not named in the writ may be allowed to appear and defend, on an affidavit that he is in possession by himself or his tenant; and in the latter case must state in his appearance that he defends as landlord. The term "landlord" extends to the heir, devisee, or remainderman under the same title, or a mortgagee. See *Doe d. Willis v. Birchmore*, 9 Ad. & E. 668, 669, *per Coleridge, J.*

These rules replace the C. L. P. Act, 1852, ss. 172, 173, but the latter section contained a proviso that a person appearing as landlord should be allowed to set up any defence hitherto allowed to a landlord, and no other. Under the old practice, one who defended as landlord, could not rely upon any title which the tenant in possession would be estopped from setting up. *Doe d. Knight v. Smythe*, 4 M. & S. 347; *Doe d. Mee v. Litherland*, 4 Ad. & E. 784; *Doe d. Willis v. Birchmore*, 9 Ad. & E. 662; *Doe d. Manvers, El. v. Mizem*, 2 M. & Rob. 56. When the tenant in possession let judgment go by default, the person defending as landlord could not set up, as a defence, the want of a notice to quit from the plaintiff to such tenant. *Doe d. Davis v. Creed*, 5 Bing. 327. But, where both landlord and tenant defended, the tenant was not precluded from showing an outstanding tenancy in the third party, under the joint demise of his landlord and the plaintiff, as tenants in common. *Doe d. Wawn v. Horn*, 3 M. & W. 333. Thus, as in copyholds, the forfeiture of the copyhold tenant does not destroy a lease made by him, with the licence of the lord, before forfeiture, the party in possession by receipt of rent from the occupying tenant, and who had been admitted to defend as landlord, might set up the subsisting lease against the lord, notwithstanding a forfeiture had been committed by the copyhold tenant. *Clarke v. Arden*, 16 C. B. 227; 24 L. J., C. P. 162.

By Rules, 1883, O. xvi. r. 1, *ante*, p. 998, we have seen that one of the questions at the trial is, to what part of the property in question the plaintiff is entitled.

Statutes of Limitations.] The period of limitation in the action for the recovery of land was formerly governed by the Limitation Act, 1623, 21 J. 1, c. 16, ss. 1, 2 (repealed by the Stat. Law Rev. Act, 1863), but is now by the Real Property Limitation Act, 1833 * (3 & 4 W. 4, c. 27), which specifies in detail the various periods at which, in different cases, the statute shall begin to operate, and the manner in which, by acknowledgment, its operation may be prevented. The provisions of this act have been modified by the Real Property Limitation Act, 1874 * (37 & 38 V. c. 57), with which it is to be construed; see sects. 9, 10. This last-mentioned act repeals 3 & 4 W. 4, c. 27, ss. 2, 5, 16, 17, 23, 28, and 40, and replaces those sections by others, and it modified sect. 18, and 7 W. 4 & 1 V. c. 28 (*post*, p. 1075); see sects. 9, 12. Its general effect is, in the case of all actions commenced after Dec. 31st, 1878, to reduce the periods of limitation of 40, 20, and 10 years, to 30, 12, and 6 years respectively; to reduce the time allowed in the case of successive estates; and to remove absence beyond seas from

* These acts are cited as R. P. L. Act, 1833, and R. P. L. Act, 1874.

among the disabilities allowed to plaintiffs. The changes thus to be introduced will be noticed below by marking the alterations in italics, and stating the former period of limitation in brackets.

In the following extracts, the sections are not to be taken as transcribed *verbatim*, except where inverted commas are used; where not otherwise stated, the stat. is 3 & 4 W. 4, c. 27; the order of enactments introduced by that act is retained.

Sect. 1. The interpretation clause provides that, except where the context excludes such construction, the words used in the act are to be interpreted as follows:—

Land,—means manors and all corporeal hereditaments, and tithes (other than tithes belonging to spiritual or eleemosynary corporations sole), whether freehold, chattel, copyhold, or of any other tenure.

Rent,—means heriots, and all services and suits for which distress lies, annuities or periodical sums charged on land (except moduses or compositions belonging to such sole corporations as above).

Person through whom another claims,—means the person by, through, or under, or by the act of whom, the claimant is entitled, as heir, issue, in tail, tenant by courtesy or in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and any person entitled to an estate or interest to which the claimant became entitled as lord by escheat.

Person,—means any body politic, corporate, or collegiate, and a class of creditors, or other persons, as well as an individual; and every word importing the singular number shall extend to several persons or things as well as one; and every word importing the masculine gender only, shall extend to a female as well as a male.

R. P. L. Act, 1874, s. 1 (replacing s. 2). *No land or rent to be recovered but within 12 years after the right of action accrued to the claimant or some person whose estate he claims.*] After January 1st, 1879, “no person shall make an entry or distress, or bring an action or suit to recover any land or rent but within 12” (formerly 20) “years next after the time at which the right to make such entry or distress, or to bring such action, or suit, shall have first accrued to some person through whom he claims: or

“If such right shall not have accrued to any person through whom he claims, then within 12” (formerly 20) “years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same.”

Sect. 3. *When the right shall be deemed to have accrued.*] “The right to make an entry or distress or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say:

“When the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, *then* such right shall be deemed to have first accrued at the time of such dispossession, or discontinuance of possession, or at the last time at which any such profits or rent were or was so received: and

“When the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death,

and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, *then* such right shall be deemed to have first accrued at the time of such death: and

“When the person claiming such land or rent shall claim in respect of an estate or interest in possession, granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, *then* such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument: and

“When the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent, in respect of such estate or interest, *then* such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession: and

“When the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, *then* such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken.”

Sect. 4. *Where advantage of forfeiture is not taken by reversioner or remainderman, he shall have a new right when his estate comes into possession.*] When any right to make an entry, &c., by reason of any forfeiture or breach of condition shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry, &c., shall be deemed to have first accrued when the estate or interest shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened.

R. P. L. Act, 1874, s. 2 (replacing sect. 5). *Reversioner to have a new right.*] A right to make an entry, &c., shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate, in respect of which the land shall have been held, or the rent received, notwithstanding the person claiming such land shall, at any time previously to the creation of the estate which shall have determined, have been in possession, or in receipt of such rent.

But if the person last entitled to any particular estate, on which any future estate or interest was expectant, shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought by any person becoming entitled in possession to a future estate or interest, but within 12 years next after the time when the right to make an entry, &c., shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of these two periods shall be the longer; and

If the right of any such person to make such entry, &c., shall have been barred under this act, no person afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any

deed, will, or settlement, executed or taking effect after the time when a right to make an entry, &c., shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make any such entry, &c.

Sect. 6. *Relation of letters of administration.*] For the purposes of the act, an administrator, claiming the estate or interest of the deceased, shall be deemed to claim as if there had been no interval of time between the death and the grant of the letters of administration.

Sect. 7. *In the case of a tenant at will, the right shall be deemed to have accrued at the end of one year from its commencement.*] When any person shall be in possession, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto to make an entry, &c., shall be deemed to have first accrued either at the termination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: Provided always that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee.

Sect. 8. *No person after a tenancy from year to year, to have any right but from the end of the first year or last payment of rent.*] When any person shall be in possession, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, to make an entry, &c., shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen).

Sect. 9. *Where rent amounting to 20s., reserved by a lease in writing, shall have been wrongfully received, no right to accrue on the determination of the lease.*] When any person shall be in possession, or in receipt of any rent, by virtue of a lease in writing, by which a yearly rent of 20s. or upwards shall be reserved, and the rent reserved shall have been received by some person wrongfully claiming to be entitled to such land or rent, in reversion, immediately expectant on the determination of such lease, and no payment in respect of the rent reserved shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, to make an entry, &c., after the determination of the lease, shall be deemed to have first accrued at the time at which the rent reserved was first so received by the person so wrongfully claiming; and no such right shall be deemed to have first accrued upon the determination of the lease to the person rightfully entitled.

Sect. 10. *Merely entry not to be equivalent to possession.*] “No person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon.”

Sect. 11. *Continual claim.*] “No continual or other claim upon or near any land shall preserve any right of making an entry or distress, or of bringing an action.”

Sect. 12. *Possession by co-tenants.*] Possession or receipt of more than his share by one coparcener, joint-tenant, or tenant in common, for his own benefit or that of a third person, shall not be deemed to be the possession, &c., of his coparceners, &c.

Sect. 13. *Possession of younger brother.*] Possession or receipt by a younger brother or relation to an heir shall not be deemed to be the possession or receipt by the heir.

Sect. 14. *Acknowledgment in writing given to the person entitled, or his agent, to be equivalent to possession or receipt of rent.*] When any acknowledgment of the title of the person entitled shall have been given to him or his agent in writing, signed by the person in possession or in receipt of the profits or rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given shall be deemed to have been the possession or receipt of or by the person to whom such acknowledgment shall have been given, and the right of such last-mentioned person to make an entry or distress, or bring an action, shall be deemed to have first accrued at the time at which such acknowledgment or the last of such acknowledgments was given.

R. P. L. Act, 1874, s. 3 (replacing sect. 16). *Persons under disability of infancy, lunacy, coverture, and their representatives, to be allowed six years from the termination of their disability or death.*] If at the time at which the right of any person to make an entry, &c., shall have first accrued, such person shall have been under any of the following disabilities, that is to say, infancy, coverture, idiocy, lunacy, unsoundness of mind, then such person, or the person claiming through him, may, notwithstanding the period of 12 (formerly 20) years shall have expired, make an entry, &c., at any time within six (formerly 10) years next after the time at which the person to whom such right first accrued shall have ceased to be under such disability, or shall have died (which shall have first happened).

R. P. L. Act, 1874, s. 4. *No allowance for absence of plaintiff beyond seas.*] "The time within which any such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of this act," 1st Jan., 1879, "be extended or enlarged by reason of the absence beyond seas, during all or any part of that time, of the person having the right to make such entry, or to bring such action or suit, or of any person through whom he claims."

R. P. L. Act, 1874, s. 5 (replacing sect. 17). *Entry, &c., to be within 30 years at all events.*] The entry, distress, or action shall be made or brought at all events within 30 (formerly 40) years after the right accrued, although the disability may have continued during the whole of that time, or the six (formerly 10) years from the termination of the disability or death shall not have expired.

Sect. 18, amended by R. P. L. Act, 1874, s. 9. *Allowance for a second disability limited.*] When any person shall be under any of the above disabilities at the time at which his right first accrued, and shall die under such disability, no time beyond the period of 12 (formerly 20) years next after the right first accrued, or the period of six (formerly 10) years next after his death, shall be allowed by reason of any disability of any other person.

Sect. 20. *When the right to an estate in possession is barred, the right of the same person to future estates shall also be barred.*] When the right of any person to an estate or interest in possession shall have been barred by the determination of the period limited in such case, and he shall at any time during the said period have been entitled to any other estate, interest, right or possibility, in reversion, remainder, or otherwise, in the same land, &c., no

entry, &c., shall be made by him, or any person claiming through him, in respect of such other estate, &c., unless in the meantime such land, &c., shall have been recovered by some person entitled to an estate, limited or taking effect after, or in defeasance of, the estate or interest in possession.

Sect. 21. *Effect of barring estate tail.*] When a tenant in tail is barred by this statute, all persons, whose estate he might have barred, are also precluded from their entry, distress, or action.

Sect. 22. *Possession adverse to a tenant in tail shall run on against the remainderman whom he might have barred.*] When a tenant in tail, entitled to recover the land, shall have died before the expiration of the period applicable to such case, no person claiming any estate which such tenant in tail might lawfully have barred, shall make an entry, &c., but within the period during which, if such tenant in tail had continued to live, he might have made such entry, &c.

R. P. L. Act, 1874, s. 6 (replacing sect. 23). *Where there shall have been possession under an assurance by a tenant in tail, which shall not bar the remaindermen, they shall be barred at the end of 12 years after the time when the assurance, if then executed, would have barred them.*] When a tenant in tail shall have made an assurance, which shall not operate to bar an estate to take effect after or in defeasance of his estate tail, and any person shall, by virtue of such assurance, be in possession of such land, &c., and the same person, or any other person whatsoever (other than some person entitled to such possession, in respect of an estate which shall have taken effect after, or in defeasance of the estate tail), shall continue in such possession for the period of 12 (formerly 20) years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, would, without the consent of any other person, have operated to bar such estate, then at the expiration of such period of 12 (formerly 20) years the assurance shall be effectual against any person claiming any estate, &c., to take effect after or in defeasance of the estate tail.

Sect. 24. *Limitation of time in equity the same as at law.*] “No person claiming any land or rent in equity shall bring any suit to recover the same, but within the period during which by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity.”

Sect. 25. *Where express trust, right first accrues on a conveyance to purchaser.**] “When any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust* or any person claiming through him, to bring a suit against the trustee or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him.”

* By the J. Act, 1873, s. 25 (2), “No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations.” See, however, the R. P. L. Act, 1874, s. 10, cited *ante*, p. 720, and the Trustee Act, 1888, s. 8, *ante*, p. 680. As to the meaning of express trust, *vide ante*, p. 679, and *post*, p. 1077.

Sect. 26. *Where fraud, time shall not run while fraud concealed.*] “In every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at, and not before, the time at which such fraud shall, or with reasonable diligence might have been first known or discovered; provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents on account of fraud, against any *bonâ fide* purchaser for valuable consideration who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed.”

R. P. L. Act, 1874, s. 7 (replacing sect. 28). *Mortgagor to be barred at end of 12 years from the time when the mortgage took possession, or from the last written acknowledgment.*] “When a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor or any person claiming through him shall not bring any action or suit to redeem the mortgage but within 12” (formerly 20) “years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right to redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him; and in such case no such action or suit shall be brought but within 12” (formerly 20) “years next after the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given.” The acknowledgment shall be effectual if given to one of several mortgagors; but where there are several mortgagees, it shall be effectual only against those who signed it.

Sect. 29. *Ecclesiastical, &c. corporations.*] No lands or rents are to be recovered by ecclesiastical or eleemosynary corporations sole but within two incumbencies and six years after a third appointment, or 60 years.

Sect. 34. *The right of the party out of possession extinguished.*] At the determination of the period limited by the act for making an entry or distress, or bringing an action, or *quare impedit*, the right and title to the land, rent, or advowson, for the recovery whereof an entry, distress, or action might have been made or brought within such period, shall be extinguished.

Sect. 35. *Receipt of rent to be deemed receipt of profits.*] “The receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease) be deemed to be the receipt of the profits of the land for the purposes of this act.”

Sect. 39. *Entry not to be tolled by descent, &c.*] No descent cast, discontinuance, or warranty, after Dec. 31st, 1833, shall toll or defeat any right of entry or action.

Cases on stat. 3 & 4 W. 4, c. 27.] The cases are here arranged as far as possible in the order of the sections; they must now be applied subject to the modifications introduced into the statute by the R. P. L. Act, 1874, *vide*

ante, p. 1063. As to the meaning, in sect. 1, of compositions, see *Irish Land Commission v. Grant*, 10 Ap. Ca. 30, 31; of appointee, see *Devon's (El. of) Settled Estates*, (1896) 2 Ch. 562, 570. Under the stat. 21 J. 1, c. 16, ss. 1, 2, it was held that the plaintiff was not barred unless the defendant showed an *adverse* possession for 20 years; as to what amounted to adverse possession, see notes to *Nepean v. Doe d. Knight*, and *Taylor v. Horde*, 2 Smith's L. C. 11th ed. pp. 649, 657. But 3 & 4 W. 4, c. 27, by sects. 2, 3, did away with the doctrine of non-adverse possession, and the question became, whether 20 (now 12) years had elapsed since the right accrued, whatever be the nature of the possession. *Nepean v. Doe d. Knight*, 2 M. & W. 894, Ex. Ch.; *Culley v. Doe d. Taylerson*, 11 Ad. & E. 1008. And, the effect of the act (see sect. 34) is to extinguish the estate of the person whose right has become barred, without transferring his estate to W., the person in possession who has acquired a statutory title, because no one has a right of entry against W. *Tichborne v. Weir*, 67 L. T. 735, T. S., 1892, C. A., explaining the *dicta* in *Scott v. Nixon*, 3 Dr. & War. 388; and *Doe d. Jukes v. Sumner*, 14 M. & W. 39, 42; see also *In re Nisbet & Potts Contract*, (1906) 1 Ch. 386, C. A.; and re-entry no longer operates as a remitter; *Brassington v. Llewellyn*, 27 L. J., Ex. 297; and, after the lapse of 12 (formerly 20) years, no payment or acknowledgment affects the title so acquired. *Sanders v. Sanders*, 19 Ch. D. 373, C. A. The statute, however, confers a statutory title in favour only either of one person who has held for the requisite period, or of a succession of persons claiming under the first wrongful possessor. Thus, where an occupier held without payment of rent for 19 years, and died leaving an heir, and his widow continued in occupation for 13 more, it was held she could not bring ejectment upon such a title, because she had neither held for 20 years nor derived under one who had so held; the possession of the husband *per se*, being evidence of a seisin in fee which descended to his heir. *Doe d. Carter v. Barnard*, 13 Q. B. 945. See also *Dixon v. Gayfere*, 12 Beav. 118; 23 L. J., Ch. 60; and *Trustees, &c. Co. v. Short*, *post*, p. 1071. But, this title was held sufficient as a *defence* to an ejectment, on the ground that the right of entry had accrued to the lessor of the plaintiff more than 20 years before. *Doe d. Goody v. Carter*, 9 Q. B. 863. The inchoate right acquired by the adverse possession of land for a less period than 20 years (now 12) was a heritable and devisable interest. *Doe d. Carter v. Barnard*, *supra*; *Asher v. Whitlock*, L. R., 1 Q. B. 1; *Clarke v. Clarke*, cited *post*, p. 1077. The act applies in favour of a mortgagee in possession against a second mortgagee. *Kibble v. Fairthorne*, (1895) 1 Ch. 219. Where the freeholder G. has let land to P. for a term of years or lives, and Y. has acquired a possessory title under the statute as against P., the surrender by P. of his lease to G. does not accelerate G.'s right of entry, so as to enable him to re-enter before the term has expired. *Walter v. Yalden*, (1902) 2 K. B. 304. Where two persons acquire title under the statute, by wrongfully holding over, they become *joint* tenants. *Ward v. Ward*, L. R., 6 Ch. 789. As to the effect of the receipt by an agent, of rent, on behalf of the heir when found, who was entitled to the lands, see *Lyell v. Kennedy*, *post*, p. 1075. Where the title of the plaintiff K., apart from the statute, is admitted, the defendant must prove that K. has been out of possession throughout the statutory period. *Kingston Race Stand v. Kingston, Mayor, &c. of*, (1897) A. C. 509, J. C.

The statute applies to land vested in a corporation, who are forbidden by a private act from selling it, without the consent of the vestry. *Brighton, Mayor of v. Guardians of Brighton*, 5 C. P. D. 368. So also to the lands of a railway company. *Bobbett v. S. E. Ry. Co.*, 9 Q. B. D. 424.

The word "rent" in sect. 2, means rent distinct from the land, as rent-charges, &c., and not rent reserved on a demise. *Grant v. Ellis*, 9 M. & W.

113. So, the statute (though it includes tithes (sect. 1)) did not prevent the tithe owner from recovering tithes, as chattels, from the occupier, though there has been no perception for 20 (now 12) years; for its operation is confined to adverse claims to the estate in the tithes. *Ely, Dean of v. Ash*, 15 M. & W. 617; *Ely, Dean of v. Bliss*, 2 D. M. & G. 459. But an annual payment due to a lay proprietor under stat. 37 H. 8, c. 12, in lieu of tithes in respect of houses in the city of London, is within sects. 1, 2. *Payne v. Esdaile*, 13 Ap. Ca. 613, D. P. The application of sect. 2 was not restrained by sect. 3 to the cases there enumerated; the object of the latter section being to explain the construction of sect. 2 in certain cases in which doubts might occur. *Devon's (El. of) Settled Estates*, (1896) 2 Ch. 562; following *James v. Salter*, 3 N. C. 553, *per Cur.* A rent-charge created by will, if there has been no payment, must have been enforced within 20 (now 12) years from the death of the testator. S. C. So the right to a quit-rent issuing out of a freehold tenement was extinguished under sects. 3 and 34 by the lapse of 20 (now 12) years from the last payment, although 20 (now 12) years have not elapsed since the first rent unpaid became due. *De Beauvoir v. Owen*, 5 Exch. 166, Ex. Ch. *Accord. Irish Land Commission v. Grant*, 10 Ap. Ca. 14, 27, *per* Ld. Selborne, C. So, where it issues out of a copyhold tenement. *Howitt v. Harrington, El. of*, (1893) 2 Ch. 497. The annual sum payable under stat. 42 G. 3, c. 116, ss. 123, 125, to the person who has redeemed the land tax, in respect of the tax so redeemed is within sect. 2. *Skene v. Cook*, (1902) 1 K. B. 682, C. A.

Sect. 2 seems to be the provision of the statute which barred tenants in tail; it had, however, no application to such estates when created by statute. *Abergavenny, El. of v. Brace*, L. R., 7 Ex. 145. The statute runs against the right of the lord of a manor to seize copyholds *quousque*, from the time at which, after proclamation or notice, the heir has failed to come in and be admitted. *Ecclesiastical Commrs. v. Parr*, (1894) 2 Q. B. 420, C. A. As to the application of sect. 2 to heriots, see *Owen v. De Beauvoir*, 16 M. & W. 547, 566, *per* Parke, B.; *Chichester, El. of v. Hall*, 17 L. T., O. S. 122, E. T. 1851, Q. B.; *Zouche, Ad. v. Dalbiac*, L. R., 10 Ex. 172.

In sect. 3, discontinuance of possession means an abandonment of possession by one entitled thereto, A.; *Rimington v. Cannon*, 12 C. B. 18; 22 L. J., C. P. 153, Ex. Ch.; followed by actual possession by another, B.; *McDonnell v. McKinty*, 10 Ir. L. R. 515; *Smith v. Lloyd*, 9 Exch. 562; 23 L. J., Ex. 194; even although the former was unaware that such possession had been taken; *Rains v. Buxton*, 14 Ch. D. 537. Where, however, B. abandons possession within 12 years the statute does not continue to run against A., and he is in the same position as when B. entered. *Trustees, &c. Co. v. Short*, 13 Ap. Ca. 793, J. C. It is otherwise, however, where B.'s possession is followed by that of C. who claims under B., and B. and C. are in possession for 12 years altogether. See *Asher v. Whitlock*, *ante*, p. 1070. Acts of user which do not interfere, and are consistent, with the purpose to which the owner intends to devote the land, do not amount to discontinuance of possession by him. *Leigh v. Jack*, 5 Ex. D. 264, C. A.; *Littledale v. Liverpool College*, *post*, p. 1072. See also *Searby v. Tottenham Ry. Co.*, L. R., 5 Eq. 409, which was, however, disapproved by James, L.J., in *Pilling v. Lancashire and Yorkshire Ry. Co.* Mich. S., 1879, see 13 Ch. D. 271, n.; and in *Norton v. L. & N. W. Ry. Co.*, *Id.* 268, C. A., uninterrupted cultivation by B. of a strip of land belonging to A., together with an adjoining field, belonging to B., was held to prove dispossession of the strip by A. *Accord. Marshall v. Taylor*, (1895) 1 Ch. 611, C. A. And where a Railway Company purchased land through which it constructed and used a tunnel, a disseisor W. may, under the statute, acquire title against it to the surface of the land vertically above the tunnel, and *usque ad cælum*, *Midland Ry. Co.*

v. *Wright*, (1901) 1 Ch. 738. "Where possession or dispossession has to be inferred from equivocal acts, the intention with which they are done is all-important." *Littledale v. Liverpool College*, (1900) 1 Ch. 19, 23, C. A., per Lindley, M.R. But the encroachment of the boughs of trees over (or, *semble*, of their roots within), the land of the adjoining owner is not a trespass or occupation of that land, which by lapse of time could become a right. *Lenmon v. Webb*, cited *ante*, p. 772. While an inscription remains on a boundary wall, stating it is the boundary wall of the adjoining proprietor, no question of the Statute of Limitations, or of adverse possession, or of cesser of possession can arise. *Phillipson v. Gibbon*, L. R., 6 Ch. 428. Possession may have been acquired by B., under circumstances which estop B. and his successors in title from relying on the statute; see *Dalton v. Fitzgerald*, *ante*, p. 1005.

Possession of the surface is *primâ facie* possession also of the minerals beneath it, where they are not dissevered in title; and therefore if a person in possession of the former as tenant, there being no exception of the mines, obtain a lease of the latter, he will be sufficiently in possession to prevent sect. 3 applying, and the statute will not begin to run until an ouster of the possession of the surface, although he may never have entered or worked the mines. *Keyse v. Powell*, 2 E. & B. 132; 22 L. J., Q. B. 305. But if they are dissevered in title, the possession of the surface by the party entitled to it is not such a possession of the mines as to amount to a dispossession of, or discontinuance of possession of them by the real owner within the definition given above. *Smith v. Lloyd*, *ante*, p. 1071. See further *Ashton v. Stock*, 6 Ch. D. 719 and *Thompson v. Hickman*, (1907) 1 Ch. 550. Sects. 2, 3, apply as between copyholder and lord; so that where the lord seized *quousque*, and had been in possession 20 (now 12) years, and there had been no disability, the right of the representative of the tenant to be admitted was barred. *Walters v. Webb*, L. R., 9 Eq. 83; L. R., 5 Ch. 531.

In the case of a void lease, the statute begins to run from the time of possession being taken under it by the tenant. *Magdalen Hospital v. Knotts*, 4 Ap. Ca. 324, D. P.

A lessor might have recovered in ejectment within 20 (now 12) years after the determination of the lease, though he had received no rent for 20 (now 12) years and upwards before such expiration, if it had not been received by any other person; his claim in such a case being of an estate in reversion within the meaning of sect. 3. *Doe d. Dary v. Ozenham*, 7 M. & W. 131. But, if the rent has been received by some other person not entitled to it, the lessor cannot recover, being barred by sect. 9; *Doe d. Angell v. Angell*, 9 Q. B. 328; and this section applied where the rent had been received *before* the act passed, by a person not entitled to it. S. C. Where A. is, as trespasser, in possession of part of land comprised in a lease to B., which is renewed by C. to B., contemporaneously with a surrender by him, the lessor's right of entry accrues at the time of the surrender. *Ecclesiastical Commrs. v. Rowe*, 5 Ap. Ca. 736, 741, 742, D. P., explaining *Corpus Christi Coll. v. Rogers*, 49 L. J., Ex. 4, C. A. It is otherwise however if, at the time of the surrender, A. was in possession under a title which was good as against C. S. C.; *Ecclesiastical Commrs. v. Tremer*, (1893) 1 Ch. 166.

Sect. 3 was not intended to apply to the case of persons standing in the relation of trustee and *cestui que trust*; and where the latter was in possession, there was no right of entry in the trustee under sect. 2, until the tenancy at will of *cestui que trust* had been determined. *Drummond v. Sant*, L. R., 6 Q. B. 763: following *Garrard v. Tuck*, 8 C. B. 231, where *Doe d. Jacobs v. Phillips*, 10 Q. B. 136, is questioned. *Accord. Warren v. Murray*, (1894) 2 Q. B. 648, C. A. Where payment of rent is made by a former terre-

tenant, without notice to the landlord that he is no longer such tenant, there is no discontinuance of receipt, within sect. 3. *Adnam v. Sandwich, El. of*, 2 Q. B. D. 485.

Under the R. P. L. Act, 1874, s. 2, *ante*, p. 1065, a foreclosure action on an equitable charge on a contingent reversionary interest in land, may be brought within 12 years after the interest falls into possession. *Hugill v. Wilkinson*, 38 Ch. D. 480; explained *In re Owen*, (1894) 3 Ch. 220. The proviso in sect. 2 as to time running when the "person last entitled" is not in possession, applies only when the right to possession and the actual possession are separated: thus, when the owner, A., of the particular estate has assigned it to B., B. is the "person last entitled," under the proviso. *Pedder v. Hunt*, 18 Q. B. D. 565, C. A. See further *Devon's (El. of) Settled Estates*, (1896) 2 Ch. 562. A freehold reversion expectant on the determination of a lease for lives or years is not a "future estate or interest" within the proviso. *Walter v. Yalden*, (1902) 2 K. B. 304. Where a father, A., has entered into possession of the rent of land belonging to his infant son, B., A. must be taken to have so entered as bailiff for B., and the statute does not begin to run against B., until, at any rate, he is of age. *Thomas v. Thomas*, 2 K. & J. 79; *In re Hobbs*, 36 Ch. D. 553.

In sect. 4 the words "forfeiture," and "breach of condition," include cases where the estate has passed over under a conditional limitation. *Astley v. Esser, El. of*, L. R., 18 Eq. 290.

Under sect. 6 (*ante*, p. 1066), time begins to run against an administrator claiming a leasehold of the intestate A., from the date of A.'s death. *In re Williams*, 34 Ch. D. 558.

Sect. 7 has been said to apply only "to tenancies at will pure and simple," where there is "an effective right of entry." *Warren v. Murray*, (1894) 2 Q. B. 648, 655, 659, *per* Ld. Esher, M.R., and A. L. Smith, L.J. The proviso in sect. 7 seems to include implied trusts: S. C., following *Drummond v. Saut, ante*, p. 1072. It was indeed held not to apply to a mortgagee, who had been paid the mortgage debt, but had not reconveyed the estate. *Sands to Thompson*, 22 Ch. D. 614. See, however, (1894) 2 Q. B. 657, *per* Kay, L.J. If the *cuius que trust* be merely allowed to receive the rents, or otherwise manage the property, he is but a bailiff of the trustee, and the occupation under these circumstances of any other person for more than 20 (now 12) years without payment of rent will bar the trustee. *Melling v. Leak*, 16 C. B. 652; 24 L. J., C. P. 187. In *Doe d. Bennett v. Turner*, 7 M. & W. 226, it was laid down that if, after a determination of a tenancy at will, the tenant continued in possession as mere tenant at sufferance, and not as tenant at will under a new tenancy, the time would run (under sect. 7) from the end of the first year of the original tenancy at will; the Ex. Ch. (*infra*) declined giving any opinion on the point; and in *Randall v. Stevens*, and *Locke v. Matthews, post*, p. 1074, the courts considered this doctrine questionable in a Court of Error. This was, however, the construction followed in *Day v. Day*, L. R., 3 P. C. 751, 760, 761, where it was held that the letting and conveying part of the lands in question by the tenant at will, with the knowledge of, and without any interference from, the owner in fee, did not necessarily create a new tenancy at will so as to stop the statute from running. See also *Doe d. Goody v. Carter*, 9 Q. B. 863. See the cases discussed in the notes to *Nepean v. Doe d. Knight*, 2 Smith's L. C. 11th ed. pp. 680 *et seq.* But a tenancy at will is determined by a legal mortgage of the premises by the owner J., with the knowledge of the tenant at will, H. *Jarman v. Hale*, (1899) 1 Q. B. 994. After the mortgage a new tenancy at will may be created between J. and H., so as to cause the statute to begin to run afresh. S. C. A., in 1817, let B. into possession of a farm as tenant at will, and in 1827 A. entered upon the land without B.'s consent, and

cut and carried away stone therefrom; it was held that this entry determined the estate at will, so that ejectment might, under sect. 7, be brought within 21 years from such entry. *Turner v. Doe d. Bennett*, 9 M. & W. 643, Ex. Ch. In *Randall v. Stevens*, 2 E. & B. 641; 23 L. J., Q. B. 68, a tenancy at will was determined within 21 years of its commencement, by actually turning the tenant out of possession, and the tenant immediately resumed, and thenceforward continued in possession without any fresh tenancy being created; and it was held that the landlord had a right of entry within 21 years of this resumption of occupation by the tenant, although after 20 years from the commencement of the tenancy at will. So, where the defendant, being tenant at will of a house and land, was served with a notice of ejectment by the landlord, but was afterwards permitted to retain the house and part of the land for his life, the landlord taking possession of the other part; it was held that as there was an actual entry, and a new tenancy at will was created, the 21 years were to be reckoned from that time. *Locke v. Matthews*, 13 C. B., N. S. 753; 32 L. J., C. P. 98. In the above cases, it was held that the acts of the plaintiffs were not *mere entries* within sect. 10. So, where the defendant was in possession of a piece of ground, only by having erected and kept a fence round it; the plaintiff destroyed the fence and erected a notice board on the land offering it for sale; it was held that the statute ran only from the time of this entry. *Worssam v. Vanderbrande*, 17 W. R. 53, M. T. 1868, C. P. But, a mere symbolical possession, by telling the family of the occupier that the claimant takes possession, and by carrying away a stone from a cottage, is a mere entry under sect. 10, and will not revert possession in the party entitled. *Doe d. Baker v. Coombes*, 9 C. B. 714; 19 L. J., C. P. 306. The absence of the head of the family at the time was adverted to in the judgment. So, where a person was in possession of premises as tenant at will without payment of rent, the entry of the landlord to do repairs without objection by the tenant does not determine the will. *Lynes v. Snaith*, (1899) 1 Q. B. 486.

An encroachment made, even with the consent of the landlord, of whom the adjoining land is held on lease, does not create a tenancy at will within sect. 7, as to such encroachment, and the statute runs only from the determination of the lease. *Whitmore v. Humphries*, L. R., 7 C. P. 1. So, an encroachment by a copyhold tenant on the adjoining waste, at any rate where the lord may by custom grant portions thereof as copyhold, is held by him as copyhold only. *A.-G. v. Tomline*, 5 Ch. D. 750. But where the title of the lord is ousted by A.'s possession, otherwise than by encroachment, A. acquires a freehold title. S. C., 15 Ch. D. 150, C. A. See further, as to accretions, *E. Stonehouse, &c. Council v. Willoughby Bros.*, (1902) 2 K. B. 318. As to proof of tenancy at will under sect. 7, see *Ley v. Peter*, 3 H. & N. 101; 27 L. J., Ex. 239. Sect. 7 does not apply to tenancies determined before the passing of the act; *Doe d. Evans v. Page*, 5 Q. B. 767; *Doe d. Birmingham Canal Co. v. Bold*, 11 Q. B. 127; but only to those created subsequently, or in existence at that time. *Doe d. Dayman v. Moore*, 9 Q. B. 555.

In sect. 8, the word "rent" at the commencement has the same meaning as in sect. 2 (*vide ante*, p. 1070); but at the end of sect. 8, "rent" means rent-service. *Doe d. Angell v. Angell*, 9 Q. B. 356, *per Cur.*; *Baines v. Lumley*, 16 W. R. 674, E. T. 1868, C. P. A. let land to B. by parol from year to year, reserving rent payable in May and November; the last payment of rent was in March, 1846. A. died in December, 1846, and in October, 1866, A.'s heir brought ejectment against B.; it was held that the case was within sect. 8 and not sect. 3, and therefore the statute ran from the last payment of rent, and not from A.'s death. S. C. A reserved service of

cleaning a church or ringing a bell is a "rent" within sect. 8 of the act, as a distress might be made for it. *Doe d. Edney v. Benham*, 7 Q. B. 976. Proof of payment of rent to the plaintiff by A. while in occupation within 20 (now 12) years, and an admission by the defendant that he held under A., is a sufficient payment within sect. 8. *Doe d. Spencer, El. v. Bickett*, 4 Q. B. 601. A statement by A., since deceased, while in occupation of property in W., "I have no property in W., but what I hold of S., and for which I pay 100l.," is evidence of payment of rent at that time, so as to bring the case within sect. 8, and is not a mere acknowledgment of title, which must be in writing under sect. 14. S. C. The lease in writing mentioned in this section must be an instrument passing an interest, and not a mere written instrument showing the terms of the holding. *Doe d. Lansdell v. Gower*, 17 Q. B. 589; 21 L. J., Q. B. 57. In *Bunting v. Sargent*, 13 Ch. D. 330, Jessel, M.R., held that the action might be brought within 12 years from the last payment of rent, although when such payment was made, the right of entry was barred, by reason of non-payment of rent. *See quære?* see *Sanders v. Sanders*, and other cases cited, *ante*, p. 1070, and Darby & Bosanquet on Stats. of Limitation, 2nd ed. p. 362. K., who had acted as agent and bailiff of D., after D. had died intestate, continued to receive the rents of D.'s land, and paid them into a bank, stating he was acting on behalf of the heir-at-law, when found. K. did this for more than 12 years, and then claimed the land as his own. It was held that L., the heir, was not thereby dispossessed, that he could, within a reasonable time after it was ascertained he was the heir, ratify K.'s acts, and he did so by bringing an action for recovery of the land from him. *Lyell v. Kennedy*, 14 Ap. Ca. 437, D. P.

In sect. 9, the word "rent" has the same change of meaning as in sect. 8, *vide ante*, p. 1074. *Doe d. Angell v. Angell*, *ante*, p. 1074; *Shaw v. Keighron* 1. R., 3 Eq. 574, R. The receipt of rent reserved on a lease, by a person not entitled, is a receipt under sect. 9 by a person "wrongfully claiming;" *Williams v. Pott*, L. R., 12 Eq. 149; but the decision in *Shaw v. Keighron*, *supra*, seems to be to the contrary. If the agent, A., be the person entitled, the receipt will make the statute run against himself, for receipt of rent by an agent is receipt by the principal (*Williams v. Pott*, *supra*), even although A. be entitled in right of his wife. *Hounsell v. Dunning*, (1902) 1 Ch. 512.

In consequence of some doubts intimated by Patteson, J., in *Doe d. Jones v. Williams*, 5 Ad. & E. 291, 296, as to whether sect. 2 had not put the mortgagee, as between himself and the mortgagor, in a worse position than he was prior to the act, it was declared by Littledale's Act (7 W. 4 & 1 V. c. 28), amended by R. P. L. Act, 1874, s. 9, *vide ante*, p. 1063, that persons entitled to or claiming under any mortgage, may make an entry or bring an action to recover the land at any time within 12 (formerly 20) years next after the last payment of any part of the principal or interest secured, though more than 12 years (formerly 20) may have elapsed since the right of entry and action first accrued. This act applies not only as against the mortgagor and persons claiming under him, but it enables a mortgagee to recover where the mortgagor would himself be barred by the statute, provided the mortgage be an existing one and were executed before the commencement of the possession of the person claiming to have acquired a title by such possession under the statute. *Ludbrook v. Ludbrook*, (1901) 2 K. B. 96, C. A.; *Doe d. Palmer v. Eyre*, 17 Q. B. 366; 20 L. J., Q. B. 431. Thus, when a tenant was let into possession within 20 (now 12) years before a mortgage, and paid no rent for 25 years after the mortgage, but the mortgagor had paid interest within 20 (now 12) years the mortgagee was not barred. S. C.; *Ford v. Ager*, 2 H. & C. 279; 32 L. J., Ex. 269. And a mortgagee may by sale, either under a power or by direction of the mortgagor, convey all the rights which he possesses to a purchaser, who will then be a person claiming under

a mortgage, and entitled to the same time for bringing actions as the mortgagee was entitled to at the time of the sale. *Doe d. Baddeley v. Massey*, 17 Q. B. 373; 20 L. J., Q. B. 434, as to which case *vide infra*. The act does not, however, apply unless the mortgage is continuing or subsisting. *Thornton v. France*, (1897) 2 Q. B. 143, 157, C. A. And where the mortgagor is not in possession at the time of the mortgage and the statute has then begun to run against him, the mortgagee does not acquire a new right of entry. S. C., doubting *Doe d. Baddeley v. Massey*, *supra*; on the ground that in that case the mortgage had ceased to exist. A foreclosure action is an action to recover the land, within these statutes. *Heath v. Pugh*, 6 Q. B. D. 345, C. A.; 7 Ap. Ca. 235, D. P. A mortgagee may bring an action, to recover possession of the mortgaged land, within 12 years after an order of foreclosure, although more than 12 years have elapsed since the date of the mortgage, or since the last payment of principal, or interest. S. C. As to acknowledgment under this act by payment, see *Harlock v. Ashberry*, *Bradshaw v. Widdrington*, and *Chinnery v. Evans*, cited *ante*, p. 721, and *Lewin v. Wilson*, 11 Ap. Ca. 639, J. C.

The effect of a writing as an acknowledgment under sect. 14, is for the judge and not for the jury. *Doe d. Curzon v. Edmonds*, 6 M. & W. 295. Letters containing an admission of rent due, written to the plaintiff's solicitor, are a sufficient acknowledgment. *Fursdon v. Clogg*, 10 M. & W. 572. By indenture, dated Oct. 27th, 1827, between the defendant and the plaintiff, after reciting that certain copyhold premises were surrendered "this day" to the plaintiff for securing the repayment of 300*l.* by him "this day" lent to the defendant, the plaintiff covenanted, on repayment of that sum, and interest, on April 27th, 1828, to surrender the premises to the defendant, and the defendant covenanted to pay the 300*l.* and interest at the time appointed for payment; there was also a stipulation that, in default in payment the plaintiff might take possession of the premises. The deed was, in fact, executed on the 23rd of August, 1834. No principal, interest, or rent had ever been paid by the defendant. In February, 1854, the plaintiff brought ejectment. Held, that the deed was sufficient acknowledgment within sect. 14 of the plaintiff's title at the time of the execution of the deed, and consequently the right of entry was not barred. *Jayne v. Hughes*, 10 Exch. 430; 24 L. J., Ex. 115. An answer to a bill in chancery, filed by the plaintiff in ejectment, by a person, through whom the defendant claims, admitting that he holds under the plaintiff, is an acknowledgment within sect. 14. *Goode v. Job*, 1 E. & E. 6; 28 L. J., Q. B. 1. The signature must be that of the party in possession or receipt of rents, and not that of an agent. *Ley v. Peter*, 3 H. & N. 101; 27 L. J., Ex. 239.

Where the person to whom the right of entry accrued was under disability, and before the removal of that disability falls under another disability, sect. 16 preserved the right to bring an action till ten (now six) years after the removal of the latter disability. *Borroves v. Ellison*, L. R., 6 Ex. 128. No extension of time to mortgagors under disabilities is given by sect. 16; *Kinsman v. Rouse*, 17 Ch. D. 104; or the R. P. L. Act, 1874, s. 3; *Forster v. Patterson*, *Id.* 132.

As under 21 J. 1, c. 16 (*Doe d. Durore v. Jones*, 4 T. R. 300, 310), when the statute has once begun to run, no subsequent disability will prevent its continuing to run. *Goodall v. Skerratt*, *post*, p. 1077; *Garner v. Wingrove*, (1905) 2 Ch. 233. A feme sole, seised in fee, married, and she and her husband quitted possession of the land; both died at times not shown to be within 40 years from the ceasing to occupy; the wife's heir brought ejectment within 20 years of the husband's death and within five years of the passing of the statute, but more than 40 years after she and her husband had left the land; it was held, that the heir was barred by sect. 17, though it did not appear

how the defendant came into possession, or that the wife had levied any fine. *Doe d. Corbyn v. Bramston*, 3 Ad. & E. 63.

The 3 & 4 W. 4, c. 27, came into operation in a colony in 1837. In 1830 A. died seised of land in the colony; B., his heir, was then beyond seas, and so died in 1835; C., the heir of A. and B., was also beyond seas in 1830, and did not come to the colony till 1856, when he brought ejectment; it was held, that the operation of sects. 2, 16, and 18 was retrospective, and that C. was barred. *Devine v. Holloway*, 14 Moo. P. C. 290.

A testator devised lands to A., and in case A. either married or took up with a Roman Catholic, or in case he died without heir, then over to B. After the testator's death, A. took up with a Roman Catholic and died without heir, having devised the lands to C. A few months after the second event, but more than 20 years after the first, B. brought ejectment against C.: it was held that sect. 20 deprived B. of the benefit of the new right of entry which accrued on the happening of the second event, and that A.'s inchoate title to the lands under the statute, he having died within 20 years of the first event, passed under his will to C. *Clarke v. Clarke*, 1 R., 2 C. L. 395. The words "estate, interest, right or possibility" in sect. 20 do not include a power of appointment. *Devon's (El. of) Settled Estates*, (1896) 2 Ch. 562.

Wherever the tenant in tail is barred by the statute, the issue in tail is also barred under sect. 21; *Austin v. Llewellyn*, 9 Exch. 276; 23 L. J., Ex. 11; but the tenant himself was barred by sect. 2, *vide ante*, p. 1071. Sects. 21 and 22 include time elapsed before the statute passed, and since the right accrued; and where the statute has once begun to run, no disability in any remainderman will prevent its continuing to run; *Goodall v. Skerratt*, 3 Drew. 216; 24 L. J. Ch. 323; but, as it does not run against any but those entitled to the possession, if a tenant in tail make a feoffment in fee or other conveyance which prevents his own entry, but does not bar the estate tail or remainders, the right of entry will first accrue, and therefore the statute will first begin to run, on his death. *Rimington v. Cannon*, 12 C. B. 18; 22 L. J., C. P. 153, Ex. Ch.; *Morgan v. Morgan*, L. R., 10 Eq. 99; and see *Goodall v. Skerratt*, *supra*. Sect. 23 applied only to cases where the tenant in tail has made a conveyance effectual to bar his issue. *Morgan v. Morgan*, *supra*, following *Penny v. Allen*, 7 D. M. & G. 409; *Mills v. Capel*, L. R. 20 Eq. 692.

Sect. 25 is "confined to express trusts, *i.e.*, trusts expressly declared by a deed, or a will, or other written instrument; it does not mean a trust that is made out by the circumstances." *Petre v. Petre*, 1 Drew. 371, 393, *per* Kindersley, V.-C. See *Sands to Thompson*, 22 Ch. D. 614, and *Banner v. Berridge*, 18 Ch. D. 254. Where there is a devise of a house and land to executors on trusts, with trusts declared of the house only, the land is held by them for the heir-at-law on an express trust within sect. 25. *Patrick v. Simpson*, 24 Q. B. D. 128. So a devise of land upon trust for sale and conversion, is, as regards land remaining unsold, within sect. 25. *Mulrow v. Bigg*, L. R., 18 Eq. 246; reversed on other grounds, 1 Ch. D. 385, C. A. A security in the form of a trust for sale, is a mortgage within sect. 28, and does not fall within sect. 25. *Locking v. Parker*, L. R., 8 Ch. 30; *In re Alison*, 11 Ch. D. 284, C. A. Nor does the trust under which, by virtue of stat. 11 G. 4 & 1 W. 4, c. 40, the executors hold the undisposed of residue of personalty in trust for the next of kin. *In re Lacy*, (1899) 2 Ch. 149. As to when property is claimed through a trustee within sect. 25, see *E. Stonehouse, &c. Council v. Willoughby Bros.*, (1902) 2 K. B. 318.

To fall within sect. 26, it is not enough "to prove a concealed fraud, the person bringing the suit must show that he, or some person through whom he claims, has been by such fraud deprived of the land which he seeks to recover,

and that the fraud could not with reasonable diligence have been known or discovered more than the statutory period before the action was brought." *Lawrance v. Ld. Norreys*, 15 Ap. Ca. 210, 214; *Willis v. Howe*, *EL.*, (1893) 2 Ch. 545, C. A. The fraud must be that "of the person setting up the statute or of some one through whom he claims." *In re McCallum*, (1901) 1 Ch. 143, C. A. As to the meaning of the term "concealed fraud," *vide* S. CC.; *Vane v. Vane*, L. R., 8 Ch. 383. With reference to what amounts to reasonable diligence within sect. 26, see *Chetham v. Hoare*, L. R., 9 Eq. 571. The term *bonâ fide* purchaser in the proviso of that section means a person who is really a purchaser, as distinguished from merely a donee taking a gift under the form of a purchase. *Vane v. Vane*, *supra*. The knowledge of the agent of the purchaser is the knowledge of the purchaser within that proviso. S. C.

Sect. 28 barred the mortgagor's right to redeem so much of the land mortgaged, as was in the possession of the mortgagee for 20 (now 12) years, although the mortgagor was in possession of other part thereof. *Kinsman v. Rouse*, 17 Ch. D. 104. An acknowledgment by the mortgagee, to a third person, not the agent of the mortgagor, is not sufficient under sect. 28. *Batchelor v. Middleton*, 6 Hare, 75, 83. Hence, after the mortgagor has become bankrupt, an acknowledgment to him by the mortgagee is inoperative, even although the bankruptcy was subsequently annulled. *Markwick v. Hardingham*, 15 Ch. D. 339, C. A. An acknowledgment given by one of two mortgagees, whom the deed shows to have advanced the mortgage money on a joint account, is ineffectual for any purpose under sect. 28. *Richardson v. Younge*, L. R., 6 Ch. 478. The act gives no extension of time to mortgagors who are under disabilities, *vide ante*, p. 1076.

Where land annexed to a deanery has become vested in the Ecclesiastical Commissioners by 3 & 4 V. c. 113, s. 50, then, until they have obtained possession, they have the same period for entry that the dean would have had under sect. 29 (*ante*, p. 1069), and their right of entry is not barred by sect. 2. *Ecclesiastical Commrs. v. Rowe*, 5 Ap. Ca. 736, D. P. *Secus*, after they have obtained possession, S. C., *Id.* 745, 753, *per* Ld. Selborne, C., and Ld. Watson. See also *Irish Land Commission v. Grant*, 10 Ap. Ca. 14, D. P.

See further, on the construction of these statutes, notes to *Nepean v. Doc d. Knight* and *Taylor v. Horde*, 2 Smith's L. C., and Chit. Stat. 3rd ed., vol. iii. pp. 25 *et seq.*; 5th ed., vol. vi., tit. *Limitation*, p. 20.

[*Statutes of Limitation in case of registered title.*] With respect to land with a registered title (as to which *vide ante*, p. 1000), the 60 & 61 V. c. 65, s. 12, provides that, "A title to registered land adverse to or in derogation of the title of the registered proprietor shall not be acquired by any length of possession," but *a person who would, but for the provisions of 38 & 39 V. c. 87, or this section, have obtained title by possession to registered land, may obtain rectification of the register subject to any estate or rights acquired by registration for valuable consideration.* "Provided also that this section shall not prejudice, as against any person registered as first proprietor of land with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of such land at the time when the registration of such first proprietor took place." The 38 & 39 V. c. 87, s. 21, which this section replaced, was in the same terms omitting the provision in italics.

[*Statutes of Limitation against the Crown and Duke of Cornwall.*] The above acts do not affect the Crown; but by the Nullum Tempus Act (9 G. 3, c. 16), the right of the Crown is in general barred as against a person who has had adverse possession for a period of 60 years. He does not,

however, thereby acquire a title. *Goodtitle d. Parker v. Baldwin*, 11 East, 488. This act has been amended by 24 & 25 V. c. 62, and its provisions have been extended to the Duchy of Cornwall, by that act and 23 & 24 V. c. 53. See also, as to the Duchy, 7 & 8 V. c. 105, s. 71 *et seq.* See stat. 21 J. 1, c. 14, & *A. G. v. Parsons*, 2 M. & W. 23, 25, 26, & *Emerson v. Maddison*, (1906) A. C. 569, J. C., decided thereon, where the Crown has been out of possession for 20 years.

ACTION OF REPLEVIN.

Replevin lies for goods unlawfully taken, as on an allegation that they belonged to and had been stolen from the person taking them; the remedy is not confined to goods taken away by way of distress. *Mellor v. Leather*, 1 E. & B. 619; 22 L. J., M. C. 76. It lies for goods improperly taken for a poor rate, made on a person not in occupation, even though an appeal against the rate had been disallowed by the court of quarter sessions. *Rhymney Ry. Co. v. Price*, 16 L. T., 394, E. T. 1867, B. C.; *Milward v. Cuffin*, 2 W. Bl. 1330. See also *Pedley v. Davis*, 10 C. B., N. S. 492; 30 L. J., C. P. 374, cited *post*, p. 1138. So it lies whenever any subject-matter, included in an entire rate, is not rateable. S. C.; *L. & N. W. Ry. Co. v. Buckmaster*, L. R., 10 Q. B. 70; in this case, *Id.* 444, the Ex. Ch. were equally divided. Where, however, the rate is made on a person liable to be rated, and it is good on the face of it, replevin will not lie, but an appeal is the proper remedy. *Marshall v. Pitman*, 9 Bing. 595. See also *Manchester Overseers v. Headlam*, 21 Q. B. D. 96.

Many of the cases and authorities on the issues raised in replevin and the evidence thereon will be found *sub tit. Action for illegal distress, ante*, pp. 899 *et seq.*

In some cases of distress the defendant was allowed by statute to plead not guilty, or, in a general form, that the matter complained of was done under the authority of an Act of Parliament, and to give the special matter in evidence under such general defence; as by 23 H. 8, c. 5, s. 11, in the case of sewers rates. 1 Wms. Saund. 347 c. (d). The statutory right to plead the general issue is now, however, abolished by 56 & 57 V. c. 61, s. 2, as regards any proceeding to which that act applies; *vide post*, pp. 1131 *et seq.* As to avowry for rent, see 11 G. 2, c. 19, s. 22, *post*, p. 1080.

The right to begin at the trial in replevin is the same as in other personal actions (*ante*, pp. 284 *et seq.*), although both parties are actors. *Curtis v. Wheeler*, M. & M. 493.

The old terms "avowry" and "cognizance" have been for brevity retained below, as names for defences justifying seizure by the defendant; the former in his own right, and the latter under the authority of another.

There were certain technical rules which formerly applied to this action, which are briefly stated below; it is, however, uncertain whether they apply to the new practice; and at any rate the power of amendment will probably render them of little importance. The place in which goods were alleged in the declaration to have been taken was material. *Weston v. Carter*, 1 Sid. 9; 1 Wms. Saund. 347 (1). But it was sufficient for the plaintiff, on the plea of *non cepit*, to show that the defendant had the goods in his possession in the place alleged; for the wrongful taking is continued in every place in which he afterwards detained them. *Walton v. Kersop*, 2 Wils. 354. If in fact the defendant neither took the cattle in the place named, nor had them there afterwards, the plaintiff must have failed; but the defendant was not entitled to a return, or to damages under 21 H. 8, c. 19, unless he pleaded

cepit in alio loco, and added an avowry by way of suggestion; 1 Wms. Saund. 347 (1); and the avowry, so added, was not traversable. *Id.*

Property in defendant or a stranger.] The defendant may set up the right of a third person, or of himself to the property in the goods; for he has a right of possession against all but the right owner at the time of replevying. Bro. Replevin, pl. 31; *Butcher v. Porter*, 1 Salk. 94. And the plaintiff on this issue may prove property in *part* of the goods; Com. Dig. Pleader (3 K. 12); in which case the issue will be divisible. The defendant who has a verdict on this defence, will have a return without other avowry or cognizance. *Butcher v. Porter*, *supra*; *Salkill v. Shelton*, 2 Rolle, 64.

Avowry for rent.] When the distress is for rent, it is enacted by 17 C. 2, c. 7, s. 2, that, in case the plaintiff should be non-suited after cognizance or avowry made and issue joined, or if the verdict shall be given against him, then the jurors, impanelled or returned to inquire of such issue, shall, at the prayer of the defendant, inquire concerning the *sum of the arrears*, and the *value of the goods or cattle distrained*; and thereupon the avowant, or he that makes cognizance, shall have judgment for such arrearages, or so much thereof as the goods or cattle distrained amount unto, &c. The avowant, therefore, must be prepared to prove both the amount of the rent in arrear and the value of the goods or cattle taken; and the omission of this inquiry cannot be supplied by a writ of inquiry; *Sheape v. Culpeper*, 1 Lev. 255; 1 Wms. Saund. 195 c, (3); though the defendant may still have the common law judgment for a return. *Rees v. Morgan*, 3 T. R. 349. In all cases, except avowries for rent, the omission may be supplied by writ of inquiry. 1 Wms. Saund. 195 c, (3).

The stats. 32 H. 8, c. 37, s. 1, and 3 & 4 W. 4, c. 42, s. 37, enable the executors, &c., of a deceased landlord to distrain for arrears of rent due to their testator in his lifetime in the same way as he might have done; and the stat. 32 H. 8, c. 37, s. 4, enables tenant *pur autre vie*, or his executors or administrators, to distrain for arrears of rent reserved on underleases granted by him, notwithstanding the determination, after the rent became due, of the particular estate by death of the person on whose life it depended. The statute gives the right of distress to the executors or administrators of a deceased tenant for life. Co. Litt. 162, a, b. See further 1 Wms. Exors., 10th ed., pp. 695 *et seq.*

The 11 G. 2, c. 19, s. 22, which enables an avowry or cognizance for rent to be made in general terms, seems not to be affected by the stat. 56 & 57 V. c. 61, *vide ante*, p. 899. Hence under such avowry the defendant may recover for so much as he proves due without regard to the amount that he avowed for; *Forty v. Imber*, 6 East, 434; but the rent recovered must be parcel of that avowed for, and the defendant cannot, under an avowry for double rent for holding over, recover the single rent; *Johnstone v. Hudlestone*, 4 B. & C. 938; and in *Roskrug v. Cuddy*, 7 Exch. 840; 22 L. J., Ex. 16, it seems to have been held that under an avowry for rent due for a specific year, none of which was due, the defendant was not entitled to recover for part of the rent for the previous year.

Where a separate rent is due on closes A. and B. from the same tenant to one landlord, and he takes one joint distress over both closes, he will be entitled to succeed on separate avowries for the rent due on each. *Phillips v. Whitsed*, 2 E. & E. 804; 29 L. J., Q. B. 164. An assignee of the reversion may distrain without previously giving notice to the tenant of the assignment. *Mallory's case*, 5 Rep. 113 b.

By 3 & 4 W. 4, c. 27, s. 42, *ante*, p. 719, no more than six years' arrears of rent or interest in respect of any sum charged on or payable out of any

land or rent, shall be recoverable by distress, whether the demise, &c., be by deed or parol. *Vide ante*, pp. 722.

As to distress where the tenant is bankrupt, or is a company in liquidation, *vide ante*, pp. 906, 907.

Avowry for distress after the end of lease, and on goods fraudulently removed.] A distress after the end of the lease under 8 A. c. 18 (c. 14, Ruff.), or on goods fraudulently removed, under 11 G. 2, c. 19, must be specially pleaded, and cannot be shown under the general form of avowry. 2 Wins. Saund. 284 c, (2); *Williams v. Stiven*, 9 Q. B. 14; *Williams v. Roberts*, 7 Exch. 618; 22 L. J., Ex. 61.

By the 8 A. c. 18 (c. 14, Ruff.), ss. 6, 7, a landlord may distrain within six months after the determination of the tenancy, provided his reversion remain, and it be during the possession of the tenant from whom the rent became due. This act seems not to apply where the lease is determined by disclaimer or forfeiture. *Doe d. David v. Williams*, 7 C. & P. 322; *Grinwood v. Moss*, L. R., 7 C. P. 360, 365; see, however, *Zouch d. Ward v. Willingale*, 1 H. Bl. 312; *per Wilson, J., contra*. The power of distress given by this act is extended by 3 & 4 W. 4, c. 42, s. 38, to the executors of a deceased landlord, for arrears of rent due to him in his lifetime. Where the tenant died during the term, and his executor entered and occupied until after the expiration of the term, it was held that the landlord might distrain for the rent of the whole term; *Braithwaite v. Cooksey*, 1 H. Bl. 465; but, where the deceased was tenant at will, and his widow (who afterwards became administratrix) remained in possession, it was held that the landlord could not distrain for rent due before the death, because the tenancy was determined and there was no term or interest which passed to the administratrix; *Turner v. Barnes*, 2 B. & S. 435; 31 L. J., Q. B. 170; nor, could he have distrained if she had been administratrix at the time of the distress. S. C. The holding over need not be tortious; and where the landlord permits the tenant to hold over part of the premises, he may distrain on that part for the arrears of rent due over the whole. *Nuttall v. Staunton*, 4 B. & C. 51. But it is otherwise where the tenant retains the part under a new agreement. *Wilkinson v. Peel*, (1895) 1 Q. B. 516. There must be possession by the same tenant, and if a fresh tenant has come in, and the old tenant has left some pigs behind, they cannot be distrained under the statute. *Taylorson v. Peters*, 7 Ad. & E. 110. As to following goods, after the expiration of the lease, they having been fraudulently removed, see *Gray v. Stait, post*, p. 1082.

The stat. 11 G. 2, c. 19, ss. 1, 2, allows a landlord within 30 days to follow and distrain goods if the tenant fraudulently or clandestinely remove them to prevent a distress, unless they have been previously sold to a *bonâ fide* purchaser for value. By sect. 7, the landlord is empowered in the daytime to break into the house, barn, &c., where the goods are, and seize them, and deal with the goods as an ordinary distress for rent; the section requires the presence of a constable, and if the goods are secured in a dwelling-house, that oath be made before a justice of reasonable ground to believe that the goods are concealed in the house. This enactment is not affected by stat. 35 & 36 V. c. 92, s. 13, cited *ante*, p. 896. The avowry need not negative a *bonâ fide* sale under sect. 2; that is matter for reply. *Williams v. Roberts, supra*. Unless the conditions imposed by the statute be followed, the landlord is proceeding without authority. *Rich v. Woolley*, 7 Bing. 651, 660; and see *Cartwright v. Smith*, 1 M. & Rob. 284. The rent must have been due at the time of removal. *Rand v. Vaughan*, 1 N. C. 767. But if due, it need not be in arrear; and where a tenant on the morning of a quarter-day, fraudulently removed his goods, with intent to avoid a distress for the rent which became due on that day; and the landlord the next day

followed and seized the goods as a distress, it was held that the seizure was justified under the statute. *Dibble v. Bowater*, 2 E. & B. 564; 22 L. J., Q. B. 396. In that case the majority of the court distinguished *Rand v. Vaughan*, *ante*, p. 1081; but Crompton, J., dissented on the ground that the cases were not distinguishable. The words of the statute are "fraudulently or clandestinely"; the removal therefore need not be secret if it be fraudulent; and if the effect of the removal is to leave no sufficient distress on the premises, so that the landlord has only his barren remedy by action, it would seem that the removal is within the act. *Opperman v. Smith*, 4 D. & Ry. 33; *Parry v. Duncan*, 7 Bing. 243; M. & M. 533. But, fraud is a question for the jury; and even where the tenant admits that he removed to avoid a distress, it is a question for the jury whether there was fraud; *John v. Jenkins*, 1 Cr. & M. 227; but the facts of that case were very peculiar; there being a *bonâ fide* question between the parties whether there was any tenancy existing between them, and if so, on what terms. The landlord can only seize the goods of the tenant himself, and not those of a stranger or a lodger; *Thornton v. Adams*, 5 M. & S. 38; *Postman v. Harrell*, 6 C. & P. 225; even although the tenant has an equity of redemption in them. *Tomlinson v. Consolidated Credit, &c. Cor.*, 24 Q. B. D. 135, C. A. Where a tenant became bankrupt, and the assignees for two days after their appointment allowed three cows, which had belonged to the bankrupt, to remain and be milked on the premises, and then removed them; it was held that the landlord might follow and distrain the cows for rent due before the bankruptcy. *Welch v. Meyers*, 4 Camp. 368. The earlier enactment, 8 A. c. 18 (c. 14, Ruff.), ss. 1, 2 (repealed by the Stat. Law Rev. Act, 1867), was similar in effect to 11 G. 2, c. 19, ss. 1, 2, *ante*, p. 1081, but limited the time for following the goods removed, to five days.

Goods fraudulently removed, cannot be followed after the expiration of the demise, where the conditions required by 8 A. c. 18, ss. 6, 7, *ante*, p. 1081, do not exist. *Gray v. Stait*, 11 Q. B. D. 668, C. A.

Tenancy of plaintiff.] If to an avowry for rent in arrear the plaintiff reply denying the tenancy, the defendant must prove it, as stated in his avowry. He must prove a *demise* at a fixed rent; and therefore if, before the J. Acts, he showed what was merely an *agreement* for a lease, or a lease void at law under 8 & 9 V. c. 106, s. 3, it was insufficient. *Dunk v. Hunter*, 5 B. & A. 322; *Hegan v. Johnson*, 2 Taunt. 148; 2 Smith's L. C., 11th ed. 129. It is now, however, sufficient to show an agreement for a lease, specific performance of which would be decreed against the tenant. *Crumpp v. Temple*, 7 T. L. R. 120, Nov. 29th, 1890, *cor.* Charles, J. See further *Walsh v. Lonsdale*, 21 Ch. D. 9, C. A.; *Lowther v. Heaver*, 41 Ch. D. 248, 264, C. A., cited *ante*, p. 1014; *Manchester Brewery Co. v. Coombs*, (1901) 2 Ch. 608, 617; and 2 Smith's L. C., 11th ed. 129 *et seq.*; *Swain v. Ayres*, *ante*, p. 1029. But an agreement for a lease would under other circumstances be insufficient. S. C. A tenant holding over after notice to quit given by the landlord, but not paying rent, is not liable to a distress, in respect of the subsequent occupation, for no new tenancy is created. *Jenner v. Clegg*, 1 M. & Rob. 213. The rent, if definitely fixed, may be fluctuating in its amount. *Ex pte. Voisey*, 21 Ch. D. 442, C. A.

But, though the plaintiff enters upon the land under an agreement for a lease, in which the amount of the rent is not stated, yet if he occupy and pay yearly rent, he becomes tenant from year to year at that rent, and is liable to a distress, and an avowry, stating the terms of the tenancy accordingly, will be sufficient. *Knight v. Benett*, 3 Bing. 361. So if, entering under an agreement, the rent being named, he acknowledge a specific sum as half a year's rent to be due, although he has paid none. *Cox v. Bent*, 5 Bing. 185.

But, unless a person, entering under an agreement for a lease, pay the rent, or promise to pay a rent certain, or to settle a rent certain in account, no demise at a rent certain can be implied as to entitle the landlord to distrain. *Regart v. Porter*, 7 Bing. 451. But, if the amount of rent be named and there be a clause in the agreement that until the lease be prepared he shall hold on the stipulated terms, on entry he becomes tenant at will on these terms, and is liable to be distrained on when rent becomes due. *Anderson v. Midland Ry. Co.*, 3 E. & E. 611; 30 L. J., Q. B. 94. Where a person enters under a lease for a period exceeding three years, void at law under the 8 & 9 V. c. 106, s. 3, as not being made by deed, and the receipt given to him for rent, which he had paid for two years, but not in advance, stated the rent to be payable in advance, such being the terms of the intended lease: held, that he became a yearly tenant on the terms of paying the rent in advance. *Lee v. Smith*, 9 Exch. 662; 23 L. J., Ex. 198. A. demised to B. half a room in a factory, separated from the other half by a partition of wood, with steam power for working lace machines belonging to B., at a certain sum per annum, payable quarterly; a deduction to be made in case of hindrances in the supply of steam power beyond seven days in each quarter; this was held a sufficient demise to entitle A. to distrain. *Selby v. Graves*, L. R., 3 C. P. 594. See further, as to the creation of yearly tenancies, by holding over, or otherwise, *ante*, pp. 339, 1010 *et seq.*

Where A. entered into occupation of premises under a contract for purchase from B., which provided that for the purpose of securing the due performance of the agreements therein contained, A. admitted himself to be tenant from week to week to B. of the premises at the weekly rent of 80*l.* payable in advance, it was held that this created the relation of landlord and tenant between B. and A., and gave B. the right to distrain. *Yeoman v. Ellison*, L. R., 2 C. P. 681; *Saunders v. Musgrave*, 6 B. & C. 524. So, where in a mortgage deed, the mortgagor attorns tenant to the mortgagee, at a fixed rent, and subsequently occupies, the mortgagee may distrain. *West v. Fritche*, 3 Exch. 216; *Morton v. Woods*, L. R., 4 Q. B., 293, Ex. Ch. So where the mortgagor after attornment underlets to the plaintiff who occupies. *Kearsley v. Philips*, 11 Q. B. D. 621, C. A. In *Morton v. Woods*, *supra*, the demise was for ten years and the deed was not executed by the mortgagees; but the intention of the parties being to create a tenancy at will only, the mortgagee was held to be entitled to distrain. In such case the estoppel is created by the agreement of the parties, and it is immaterial that the deed shows the mortgagee to have no legal estate, S. C.; *Ex pte. Punnett*, 16 Ch. D. 226, C. A.; or that the mortgagor had already attorned to a prior mortgagee, whose mortgage was recited in the second mortgage. S. C. See also *In re Threlfall*, 16 Ch. D. 274, C. A.; *Ex pte. Voisey*, 21 Ch. D. 442, C. A. But where, by a mortgage deed to secure a principal sum and certain payments, it was declared that *immediately or at any time after* default should be made in such payments, the mortgagor should hold the premises as tenant to the mortgagee at a fixed rent, and default was made; it was held that the mortgagee could not, without having given the mortgagor notice of his intention to treat him as a tenant, distrain after the lapse of more than a year from default, as for a year's rent in arrear. *Gloves v. Hughes*, L. R., 5 Ex. 160. See further *Walker v. Giles*, 6 C. B. 662; *Pinkhorn v. Souster*, 8 Exch. 763; *Brown v. Metropolitan Counties Insur. Soc.*, 1 E. & E. 832; 28 L. J., Q. B. 236; *Turner v. Barnes*, 2 B. & S. 435; 31 L. J., Q. B. 170, and *Scobie v. Collins*, (1895) 1 Q. B. 375. And where the mortgagor's title has been determined by proceedings in ejectment by a superior landlord, the mortgagee's right to distrain ceases. *Serjeant v. Nash, Field & Co.*, (1903) 2 K. B. 304, C. A. Where to secure a mortgage debt due from two partners, tenants in common, they each separately attorned to the mortgagees in

respect of the land of which they were jointly in occupation, at a rent equal to half the mortgage interest; it was held that the mortgagees could not distrain upon the partnership property upon the land, but only on the separate property of each of the partners for the rent due from him. *Ex pte. Parke*, L. R., 18 Eq. 381. The Bills of Sale Act, 1878 (41 & 42 V. c. 31), s. 6, cited *post*, p. 1193, avoids, as against the execution creditors and trustee in bankruptcy of the grantor, certain instruments of attornment giving a power of distress as security for a debt. See cases thereon, *post*, p. 1202.

An attornment by a tenant of land to a receiver appointed by the Court of Chancery to collect the rents, and payment of rent to such receiver, create a tenancy by estoppel between the tenant and receiver, although it appears on the lease that the receiver has not the legal reversion. *Dancer v. Hastings*, 12 B. Moo. 34; *Jolly v. Arbuthnot*, 4 De G. & J. 224; 28 L. J., Ch. 547. But, such attornment and payment do not operate to enable the person, who is found ultimately to have the legal title to the land, to treat the tenant as *his* tenant, and to distrain for rent. *Evans v. Matthias*, 7 E. & B. 590; 26 L. J., Q. B. 309. The plaintiff paid rent to A. as agent for W. and B. trustees of C., receiving receipts, "For the trustees of C.;" the legal estate was assigned without the plaintiff's knowledge to W. and N., and he continued to pay rent to A., and received receipts as before, A. paying over the rent to W. and N.; W. and N. having distrained, proved all the above facts except the assignment to them: held, that there was some evidence of title in W. and N., as against the plaintiff, to support an avowry for rent. *Hitchings v. Thompson*, 5 Exch. 50.

One or two joint tenants may demise his or their interest to another joint tenant, so as to create the relationship of landlord and tenant between them, with a right to distrain. *Cowper v. Fletcher*, 6 B. & S. 464; 34 L. J., Q. B. 187. So, in the case of tenants in common. See *Leigh v. Dickeson*, 12 Q. B. D. 194.

Where a tenant is holding premises under the provisions of 14 & 15 V. c. 25, s. 1 (*ante* p. 336), after the expiration of his former landlord's title, until the end of the current year of the tenancy, the succeeding landlord is entitled to distrain on him for the proportionate part of the rent, due from the determination of his former landlord's title, to the expiration of the tenancy. *Haines v. Welch*, L. R., 4 C. P. 91, cited *ante*, p. 336.

Although the 11 G. 2, c. 19, s. 22, enables the defendant to avow without setting out all the particulars of title, still the terms of the tenancy must be proved as laid; the large powers of amendment now, however, render few of the cases on the subject of such variance of much guide under the present procedure, and they are therefore omitted in the present edition. As to amendments, *vide ante*, pp. 291 *et seq.*

A letting "at 120*l.* a year," determinable by "six months' notice at any quarter," does not make a quarterly but a yearly reservation. *Collett v. Curling*, 10 Q. B. 785. A lease at a rent of 40*l.*, with a covenant to make an allowance out of it of 5*l.* payable to third persons, should be alleged as a lease at a rent of 40*l.* *Davies v. Stacey*, 12 Ad. & E. 506. Proof of a tender by plaintiff of "a year's rent" in November, without stating, at the time, when it became due or the terms of the holding, is no proof, *per se*, of a holding from Michaelmas to Michaelmas as stated in the avowry. *Knight v. McDouall*, 12 Ad. & E. 438. A. demised land Y. to B., who also held the adjoining land Z., and by the lease B. gave A. a right of distress over lands Y. and Z., for the rent reserved. It was held that, at any rate in equity, A. might distrain on the lands Z. the goods of C., to whom B. had assigned his interest in the lands Y. and Z. with notice of the terms of the lease. *Daniel v. Stepmey*, L. R., 9 Ex. 185, Ex. Ch.

A tenant cannot be allowed to dispute the title of his landlord, even though it be founded in fraud. *Parry v. House*, Holt, N. P. 489, *vide ante*, pp. 333, 340, 664. On this principle, where the plaintiff in replevin came into the occupation of premises under a person who had submitted to a distress by the defendant, it was held that he could not dispute the title of the defendant, though the latter had put in evidence a deed which showed that the plaintiff's predecessor occupied under a lease to which the defendant was a stranger. *Cooper v. Blandy*, 1 N. C. 45. So, where the plaintiff, being put into possession by A., was afterwards told *bonâ fide* by A. that the defendant was entitled, and thereupon paid defendant his rent, the plaintiff cannot afterwards set up the title of a third person who has taken no steps to eject him. *Hall v. Butler*, 10 Ad. & E. 204. But, where the plaintiff came in under another person and not under the defendant, and had paid rent to the defendant in ignorance of a defect in his title, it was held that the plaintiff might show his want of title. *Rogers v. Pitcher*, 6 Taunt. 202; *Gregory v. Doidge*, 3 Bing. 474; *Claridge v. Mackenzie*, 4 M. & Gr. 143. It was held by Charles, J., on a trial that the estoppel did not bind a third person, who brought her goods on the land with the licence of the tenant, and that she claiming no interest in the land, might prove that the landlord had no title, and recover her goods. *Tudman v. Henman*, (1893) 2 Q. B. 168. *Sed quære?* for the seisin of the landlord had not been disturbed.

The plaintiff may show that the defendant's title expired before the rent became due. *Downs v. Cooper*, 2 Q. B. 256. See *Doe d. Marriott v. Edwards*, 5 B. & Ad. 1065, *ante*, p. 1005; and a tenant may show his landlord's title expired, though he has paid rent to him after such expiration, provided the rent was paid in ignorance of the defect in the landlord's title, although he knew that it was disputed. *Fenner v. Duplock*, 2 Bing. 10; *acc. Sergeant v. Nash, Field, & Co.*, (1903) 2 K. B. 304, C. A.; see also cases, *ante*, p. 334. Where the freeholder A. let premises for 61 years to B., and afterwards granted a lease to C. of the same premises to commence at the end of the 61 years, C. has held to take an *interesse terminii* only, which did not interfere with A.'s right to distrain under B.'s lease. *Smith v. Day*, 2 M. & W. 684; *Lewis v. Baker*, (1905) 1 Ch. 46. The plaintiff may dispute the avowant's derivative title from the person who let the plaintiff into possession under a denial of the tenancy. *Rogers v. Pitcher*, *supra*. An estoppel must be mutual, and if the landlord is not estopped, neither is the tenant. *Brereton v. Evans*, Cro. Eliz. 700; *Howe v. Scarrot*, 4 H. & N. 723; 28 L. J., Ex. 325, *ante*, p. 334.

If an administrator makes an underlease of a term of the deceased, reserving rent to himself, his executors, &c., it seems that though the latter shall have the rent, they cannot distrain for it, because the reversion is in the administrator *de bonis non*. *Drue v. Baylye*, Freem. 392, 403; 2 Lev. 100; 2 Wms. Exors., 10th ed. 699, 700.

Where a termor has let for the whole of his term, this operates as an assignment, and he cannot, at common law, distrain for the rent received. Brooke, Abr. Dette. pl. 39; Bac. Abr. Distress (A); *Parmenter v. Webber*, 8 Taunt. 593; 2 B. Moo. 656; *Lewis v. Baker*, *supra*. It was, however, suggested in *Pascoe v. Pascoe*, 3 N. C. 905, *per Cur.*, that the rent reserved on the lease, where the lessor retains no reversion, is a rent-*seek*, for which the 4 G. 2, c. 28, s. 5, gives a right of distress, and that the defendant might avow under that statute. This case was not cited in *Lewis v. Baker*, *supra*, where the statute was held not to apply; the point cannot therefore be considered to be finally settled. See (1905) 1 Ch. 48, n.

An eviction, which has happened before the rent became due, is a good defence. *Boodle v. Campbell*, 7 M. & Gr. 386. But, it seems, it must be an actual, not a constructive, eviction. *Delaney v. Fox*, 2 C. B., N. S. 768; 26

L. J., C. P. 250, cited *ante*, p. 1008. And as to eviction, see *ante*, pp. 341, 727. So, a surrender is a good defence. See *ante*, pp. 337 *et seq.*, 727. So the plaintiff may show that the defendant's title to a rent-service has been extinguished by the Statute of Limitations, 3 & 4 W. 4, c. 27, ss. 3, 34, and the R. P. L. Act, 1874, s. 1, *ante*, pp. 1064, 1069. *Owen v. De Beauvoir*, 16 M. & W. 547; 5 Exch. 166, Ex. Ch.

Denial of rent being in arrear.] Where rent was reserved "payable quarterly on the usual quarter days and always if required in advance," the landlord may demand payment in advance at any time during the quarter, and may distrain immediately after the demand. *L. & Westminster Loan, &c. Co. v. L. & N. W. Ry. Co.*, (1893) 2 Q. B. 49, 52, 53. In answer to an avowry for rent, the plaintiff may show that he has paid an amount equivalent to the rent, under compulsion or threat of distress or eviction, to a superior landlord or a prior incumbrancer. *Sapsford v. Fletcher*, 4 T. R. 511; *Taylor v. Zamira*, 6 Taunt. 524; *Stubbs v. Parsons*, 3 B. & A. 516; *Underhay v. Read*, 20 Q. B. D. 209, C. A. The payment is not the less compulsory because the ground landlord has allowed the occupier time to pay. *Carter v. Carter*, 5 Bing. 406. And rent growing due, as well as that already accrued due, is discharged by such a payment. *Id.* Payment by a lodger to his superior landlord, on a threat of distress, of rent due from the lodger to the mesne landlord, under 34 & 35 V. c. 79, s. 1 (*ante*, p. 904), is made payment to the latter by sect. 3. So the plaintiff may show payment of property tax in respect of the premises, by the plaintiff or the previous tenant since the last payment of rent; *Clennel v. Read*, 7 Taunt. 51; or, payment of rates which he may deduct under 32 & 33 V. c. 41, s. 1; or, under the Rating Act, 1874 (37 & 38 V. c. 54), ss. 5, 6, 8, 9. A mere demand made on the tenant without actual payment is not sufficient. *Ryan v. Thompson*, L. R., 2 C. P. 144, cited *ante*, p. 909. The payment of assessments made under the Metropolitan Management Amendment Act, 1862, 25 & 26 Vict. c. 102, s. 96; or the Public Health Act, 1875, 38 & 39 V. c. 55, ss. 214, 226, is not a discharge of rent, and where the tenant has agreed to bear such assessments, it affords no answer to a distress. *Skiuner v. Hunt*, (1904) 2 K. B. 452, C. A. *Vide ante*, pp. 343, 730.

The delivery to, and acceptance by, the landlord of a bill of exchange or promissory note for the amount of rent due affords no answer at law, for the claim for rent, even on a parol demise, is of equal degree with a speciality debt (*vide ante*, p. 693), unless the note be accepted in accord and satisfaction, or payment; *Davis v. Gyde*, 2 Ad. & E. 623; *Parrot v. Anderson*, 7 Exch. 93; 21 L. J., Ex. 291; it is, however, some evidence of an agreement by the landlord to suspend his right of distress during the currency of the bill. *Palmer v. Branley*, (1895) 2 Q. B. 405. An agreement to take interest on the rent in arrear does not take away the right of distress. *Skerry v. Preston*, 2 Chit. 245.

Authority to distrain.] If the plaintiff deny that the defendant is bailiff, as stated in the cognizance, the defendant must prove his authority to make the distress, and a recognition of his act will be equivalent to a previous command. *Trevillian v. Pine*, 11 Mod. 112; 1 Wms. Saund. 347 c. (4). And the ratification may be after action. *Per Curiam* in *Whitehead v. Taylor*, 10 Ad. & E. 213. One joint tenant, or coparcener, or co-heir in gavelkind, has an authority in law, without proof of any express command, to distrain as bailiff of his co-tenant; *Leigh v. Shepherd*, 2 B. & B. 465; but, it is not clear that he can distrain for the rest, notwithstanding the express dissent of his co-tenants. S. C.; *Robinson v. Hofman*, 4 Bing. 562. A tenant in common cannot avow as bailiff of his co-tenant

without his authority. See *Harrison v. Baraby*, 5 T. R. 216. A corporation may appoint a bailiff to distrain without deed. *Smith v. Birmingham Gas Co.*, 1 Ad. & E. 526. Where defendant makes a cognizance, as bailiff of an executor, for rent due to the testator, it is enough to prove a distress by the testator's direction, made after his death and before probate, but subsequently adopted by the executor. *Whitehead v. Taylor*, 10 Ad. & E. 210. If a lessor, having mortgaged his reversion, is permitted by the mortgagee M. to continue in receipt of the rent incident to that reversion, he, during such possession, is *ex presumptione juris* authorized, if it should become necessary, to realize the rent by distress, and to distrain for it in M.'s name as his bailiff. *Trent v. Hunt*, 9 Exch. 14; 22 L. J., Ex. 318. But where M. has appointed R. as receiver of the rent under the Conveyancing, &c. Act, 1881, 44 & 45 V. c. 41, s. 19 (iii), the lessor cannot distrain without R.'s authority. *Woolston v. Ross*, (1900) 1 Ch. 788. Where the assignee of the equity of redemption has paid off the mortgage, and obtained from the mortgagee authority to receive the rents, he may distrain in the mortgagee's name before transfer. *Snell v. Finch*, 13 C. B., N. S. 651; 32 L. J., C. P. 117. If a person, having authority to distrain for rent due to another, say at the time that he distrains for rent due to himself, he may nevertheless justify as bailiff of the other. *Trent v. Hunt*, *supra*.

A warrant of distress, directed to two jointly, in a matter connected with the execution of a public authority, may be executed by one. *Lee v. Vessey*, 1 H. & N. 90; 25 L. J., Ex. 271.

A bailiff, who has been withdrawn by the landlord, cannot go on and sell the goods seized for the purpose of defraying his charges. *Hurding v. Hall*, 14 L. T. 410, Ex., E. T. 1866.

Evidence on other replies showing the illegality of the distress.] The evidence requisite to be given on these replies will be gathered from what has been said under *Illegal Distresses*, *ante*, pp. 899 *et seq.*

Evidence on avowry for damage feasant.] The stat. 11 G. 2, c. 19, s. 22, *ante*, p. 1080, applies to distress for rent only; the defendant must, therefore, in the case of distress for damage feasant, set up his title specially by the avowry. Where the defendant avows taking cattle damage feasant, and pleads that the *locus in quo* is his soil and freehold, the plaintiff may deny it, and the evidence in such case will be the same as under the defence of title in the defendant in trespass *qu. cl. fr.* See *ante*, p. 940.

Or, the plaintiff may plead the defect of fences which the defendant was bound to repair, whereby the cattle escaped; *Bailey v. Appleyard*, 8 Ad. & E. 161; a right of common, of way, &c.; Com. Dig. Pleader (3 K. 24, 25); in which cases the evidence will of course depend upon the issue joined.

Where cattle, being lawfully driven along a highway, stray into an adjoining field, through the defect of fences, the owner is bound to remove them within a reasonable time, but the owner of the field cannot distrain them immediately; what is a reasonable time, under all the circumstances of the case, is for the jury. *Goodwyn v. Cheveley*, 4 H. & N. 631; 28 L. J., Ex. 298. If cattle get into the defendant's field through defect in a fence, which he is bound to keep up, and then break through a good fence into another field of the defendant's, he cannot distrain them damage feasant, for the damage was the natural result of his own default. *Singleton v. Williamson*, 7 H. & N. 410; 31 L. J., Ex. 17.

As to the obligation to repair fences, the general rule of law is that a man is only bound to keep his cattle from trespassing on the land of others. *Per Bailey, J.*, in *Boyle v. Tamlyn*, 6 B. & C. 337; 3 Dyer, 372 (10); Fitz.

N. B. 128, note by Ld. Hale. But, the owner and occupier of one close may be bound, by prescription, to fence, not only to keep his own cattle in, but as against those of the occupier of the adjoining close. S. CC. Where the owner granted close A. to the plaintiff, and soon afterwards an adjoining close B. to the defendant, it seems that the fact that the defendant had for 28 years, ever since the grant, repaired the fence between A. and B., which was on his own ground, was not evidence *per se* from which a jury might presume that he had bound himself by agreement to keep up the fence as against cattle in A. *Boyle v. Tamlyn*, 6 B. & C. 329. But, where the defendant and previous occupiers of an ancient copyhold tenement had always repaired the fence erected on it, between it and the waste of the manor, it was held that on the waste being inclosed under a modern inclosure act, the defendant was bound to keep up the fence against cattle on the new inclosure, as a jury might presume that the grantee of the ancient inclosure had taken it subject to the obligation to fence against the cattle on the waste. *Barber v. Whiteley*, 34 L. J., Q. B. 212. A landowner who lets part of his own land is, as against his tenant, under no further obligation to fence, than he would be as against a stranger. *Erskine v. Adeane*, L. R., 8 Ch. 756. The prescriptive obligation of the person bound to repair is to maintain, at his peril, a sufficient fence at all times, without notice to repair it; and if he fail to do so, he is liable for all damages not resulting from act of God, or *vis major*. *Lawrence v. Jenkins*, L. R., 8 Q. B. 274. The damages in respect of which the distress may be made includes injuries to animals. *Boden v. Roscoe*, (1894) 1 Q. B. 608.

A locomotive engine wrongfully on a railway is liable to be distrained damage feasant, the remedies given by 8 & 9 V. c. 20, ss. 115, 116, being cumulative. *Ambergate, &c. Ry. Co. v. Midland Ry. Co.*, 2 E. & B. 793; 23 L. J., Q. B. 17.

Tender of rent or amends.] To an avowry for rent the plaintiff may plead a tender of the rent; to an avowry for damage feasant a tender of amends.

A tender before distress makes the taking unlawful; after distress, and before impounding, it makes the detention unlawful. *Six Carpenters' case*, 8 Rep. 147 a; *Gulliver v. Cosens*, 1 C. B. 788; *Loring v. Warburton*, E. B. & E. 507; 28 L. J., Q. B. 31. Tender after impounding is too late, whether the taking be damage feasant, or for rent arrear. *Pilkington's case*, 5 Rep. 76 a; Cro. Eliz. 813; *Ladd v. Thomas*, 12 Ad. & E. 117; *Singleton v. Williamson*, 7 H. & N. 747; 31 L. J., Ex. 287. Where cattle are taken damage feasant, tender of amends is good, until they have been placed in a public pound, even although they have been impounded by the distrainer on his premises. *Green v. Duckett*, 11 Q. B. D. 275; *Browne v. Powell*, 4 Bing. 230. Since the 11 G. 2, c. 19, s. 10 (*ante*, p. 897), an impounding of cattle on the premises, with a notice that such cattle are distrained for rent, has been held a complete impounding. *Thomas v. Harries*, 1 M. & Gr. 695 (Maule, J., *diss.*). So an impounding on the premises, leaving a person in possession, without moving any of the goods, may, it seems, be an impounding, so as to preclude a tender of rent, at all events, if the distress be so conducted with the tenant's assent. *Tenant v. Field*, 8 E. & B. 336; 27 L. J., Q. B. 33 (Erle, J., *diss.*); see also *Johnson v. Upham*, *infra*. But it has been since held that a sale after a tender of rent and costs, made before the expiration of the five days, though after impounding, is wrongful within the equity of the stat. 2 W. & M. sess. 1, c. 5, *ante*, p. 895. *Johnson v. Upham*, 2 E. & E. 250; 28 L. J., Q. B. 252; overruling *Ellis v. Taylor*, 8 M. & W. 415; and see Maule's, J., judgment in *Thomas v. Harries*, *supra*, and Erle's, J., judgment in *Tenant v. Field*, *supra*.

Although it has been held that a tender of *amends* to a mere bailiff is not good; *Pilkington's case*, *ante*, p. 1088; yet if the bailiff be the avowant's usual receiver, or if it appear from other circumstances that he is his agent for that purpose, such tender may be good. *Gilb. Repl.*, 4th ed. 83; *Browne v. Powell*, *ante*, p. 1088. A tender of rent and charges is good if made to the landlord, though after a broker has received a warrant and has distrained; *Smith v. Goodwin*, 4 B. & Ad. 413; and the bailiff, to whom the warrant is given by the landlord, is authorized *virtute officii* to receive the rent, and a tender to him is good. *Hatch v. Hale*, 15 Q. B. 10; 19 L. J., Q. B. 289; and see *Boulton v. Reynolds*, 2 E. & E. 369; 29 L. J., Q. B. 11. But, a man left in possession by the bailiff or broker, to whom the warrant was given, has no such authority; and a tender to him is bad, at least where the tenant is informed that some one authorized to receive the rent is within a convenient distance. S. C. A tender of rent *without expenses*, after a warrant of distress has been delivered to a broker, but before it has been executed, is good. *Bennett v. Bayes*, 5 H. & N. 391; 29 L. J., Ex. 224.

The stat. 21 J. 1, c. 16, s. 5, cited *ante*, p. 941, does not apply to replevin. *Allen v. Bayley*, 2 Lutw. 1594.

Payment into court.] There seems now to be no provision enabling the plaintiff in replevin to pay money into court; *vide ante*, p. 755. Rules, 1883, O. l. r. 8, provide a new procedure where goods are detained under a lien.

Statute of Limitations.] By stat. 21 J. 1, c. 16, s. 3, an action of replevin must be brought within 6 years after the cause of such action.

Damages.] In case the chattels have been delivered to the plaintiff on the replevin, which is the general practice, the damages recovered by the plaintiff are usually confined to the expense of the replevin bond. *Tidd's Pract.*, 9th ed. 817; *Wilk. Repl.* 85. But when the seizure was illegal, and not merely irregular, special damage can be recovered; *Gibbs v. Cruikshank*, L. R., 8 C. P. 454; as for injury to the plaintiff's reputation as a trader; *Smith v. Enright*, (1893) W. N. 173, M. Sit., Q. B.

A replevin bond obliges the plaintiff in a replevin suit in a superior court to show, not only a successful result, but also that he had good ground for believing either that title was in question, or that the rent or damage exceeded 20*l.* See 51 & 52 V. c. 43, Part vi., cited *ante*, pp. 754, 755. It may therefore be desirable in some cases, for the successful plaintiff to procure either at, or after, the trial some declaration or certificate by the judge that the plaintiff had such ground. It does not, however, appear to be expressly made obligatory on the judge by any statute to give such certificate. In *Tunnicliffe v. Wilmot*, 2 Car. & K. 626, it seems to have been refused only because the plaintiff had failed at the trial. The certificate for costs given, under the County Courts Act, 1888, s. 116, *ante*, p. 301, is not of equivalent value.

PART III.

EVIDENCE IN ACTIONS BY AND AGAINST PARTICULAR PERSONS.

ACTIONS BY AND AGAINST CARRIERS.

See *ante*, pp. 629 *et seq.*

ACTIONS BY AND AGAINST COMPANIES, &c.

Under this head will be found the decisions and statutory provisions so far as may be useful for the purposes of this work, relating to—1. Corporations in general; 2. Companies registered under the Companies Acts, 1862, 1867; 3. Companies registered under the Joint Stock Companies Act, 1844 (7 & 8 V. c. 110); 4. Companies incorporated by statute within the Companies Clauses Consolidation Act, 1845; 5. Banking companies registered under 7 G. 4, c. 46, and other companies entitled to sue and be sued in the name of their public officer, &c.; 6. Companies constituted by charter or letters patent, under the stat. 7. W. 4 & 1 V. c. 73.

Companies formed in either of the above ways are usually called public companies; but whether the term “public” may not extend to unincorporated companies, of which the shares are transferable generally to any one at will, is open to question; see *Macintyre v. Connell*, 1 Sim. N. S. 225; 20 L. J., Ch. 286; *Nicholls v. Rosewarne*, 6 C. B., N. S. 480; 28 L. J., C. P. 273. The company mentioned in the last case was a “cost-book” company, of the kind called in *Sibley v. Minton*, 27 L. J., Ch. 53, a “monster partnership,” the nature of which and the powers and liabilities of the members of which have been discussed in *Dickinson v. Valpy*, 10 B. & C. 128; *Tredwen v. Bourne*, 6 M. & W. 461; *Hawtayne v. Bourne*, 7 M. & W. 595; *Hawken v. Bourne*, 8 M. & W. 703; *Ricketts v. Bennett*, 4 C. B. 686; *Watson v. Spratley*, 10 Exch. 222; 21 L. J., Ex. 53; *Clarke v. Hart*, 6 H. L. C. 633; 27 L. J., Ch. 615; *Hybart v. Parker*, 4 C. B., N. S. 209; 27 L. J., C. P. 120; *In re Frank Mills Mining Co.*, 23 Ch. D. 52, C. A.; and in other cases cited in *Collier on Mines*, Ch. 3, sects. 5 and 6. In *Re Bodmin United Mines Co.*, 23 Beav. 370; 26 L. J., Ch. 570, Romilly, M.R., held that whether a mine was constituted on the cost-book principle, and what was the meaning of the term, was a question of fact on evidence, and would not be judicially noticed by the court; but the constitution of these associations has been since recognized by the legislature in the Stannaries Act, 1869 (32 & 33 V. c. 19).

The crown by exercise of its prerogative can create a corporation by charter, and when so created the liability of the individual members for the liabilities of the corporation ceases, and cannot, at common law, be reserved by the terms of the charter. Under 7 W. 4 & 1 V. c. 73, s. 29, *post*, p. 1130, the liability of the members may, however, notwithstanding the incorporation of the company, be limited to a certain extent *per share*. 1 Lindley on Company Law, 6th ed. 136, 137.

Actions by or against the members of *projected* or inchoate companies, or of unincorporated companies, being mere voluntary associations not legally invested with any collective or corporate character, have been noticed, *ante*, pp. 562 *et seq.*

For actions by subscribers or allottees to recover back deposits or money advanced on projects which have failed, or are impeached for fraud, see *Action for money had and received*, *ante*, pp. 601-2, 613.

Actions against allottees of shares for non-payment of deposits are not distinguishable from ordinary cases of contract: see *Woolmer v. Toby*, 10 Q. B. 691, cited *ante*, p. 93.

Actions against railway companies as carriers, will be found under the head of *Actions against carriers*, *ante*, pp. 629 *et seq.* The evidence in actions against corporations for negligence or other torts will be found under the proper heads, *ante*, pp. 774, 794 *et seq.*; and *post*, pp. 1094 *et seq.*

Trade unions registered under 34 & 35 V. c. 31, and 39 & 40 V. c. 22 are not incorporated, and their property is held for them by their trustees; they might, however, formerly have been sued by their registered name, and in order to obtain satisfaction out of their property, the trustees have been made co-defendants. *Tuff Vale Ry. Co. v. Amalgamated Socy. of Ry. Servants*, (1901) A. C. 426, 443, 445, D. P. Where the agents of a trade union on their instructions, and for their benefit, put themselves in charge of a strike, and illegally watched and beset men to prevent them from working (*vide ante*, p. 761), the union was liable to the same extent as it would be if it were a corporation. S. C. *Id.* 433, *per* Farwell, J. The stat. 6 E. 7, c. 47, s. 4 (1), *ante*, p. 892, now, however, prohibits such actions from being entertained by any Court, and sect. 2 legalizes "peaceful picketing," in contemplation or furtherance of a "trade dispute," defined in sect. 5 (3). See further sect. 1, *ante*, p. 892, and sect. 3, *ante*, p. 910.

As to the effect of the books, &c., of public companies, *vide ante*, p. 211; and as to the admissibility of certified or examined copies of such books, *ante*, pp. 97 *et seq.*

1. Corporations in General.

Common law corporations aggregate cannot sue or defend otherwise than by their solicitor; Co. Litt. 66 b; who must be appointed under their common seal. *Arnold v. Mayor of Poole*, 4 M. & Gr. 860. But a corporation is bound by the act of their solicitor, so far as the opposite party is concerned, although there is no such appointment under seal. *Faviell v. E. Counties Ry. Co.*, 2 Exch. 344.

A corporation must sue and be sued in the corporate name. It need not be alleged in the statement of claim against a corporation that it is incorporated, using the name it is known by is sufficient. *Woolf v. City Steam Boat Co.*, 7 C. B. 103.

Contracts by corporations.] As a general rule, corporations can only contract under their common seal. Com. Dig. Franchise (F 13). To this general rule there are exceptions which were formerly "classed under one of two heads:—First, when the acts done are such as the corporation, by its very constitution, is appointed to do, as in the case of trading corporations, whose duty, by their very appointment, being to draw bills of exchange, they

may do it without affixing the common seal. Secondly, when the acts are required for convenience, management and comfort as in the cases cited in Com. Dig. *ubi supra*; as where either the acts are trivial in their nature and of frequent occurrence, so that the doing them in the usual way would be inconvenient or absurd, or such that an overruling necessity requires them to be done at once; in that case also the corporation may proceed by parol instead of affixing the seal according to the proper and regular course." *Diggle v. L. & Blackwall Ry. Co.*, 5 Exch. 450, *per* Alderson, B.; *Wells v. Kingston-upon-Hull*, L. R., 10 C. P. 402.

But recent cases have decided that "these exceptions apply to all contracts by trading corporations entered into for the purposes for which they are incorporated. A company can only carry on business by agents, managers, and others; and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding upon the company though not under seal;" these exceptions are not limited to transactions of frequent occurrence and small importance. *S. of Ireland Colliery Co. v. Waddle*, L. R., 3 C. P. 462, 469, *per* Bovill, C.J.; followed by Ex. Ch., S. C., L. R., 4 C. P. 617. In the judgment in this case the previous cases are reviewed.

Where a company, incorporated by charter for the purpose of trading as shipowners, and doing all such matters as might be incidental to such undertaking, made a contract with A. to go out to Sydney and bring home a disabled ship belonging to the company; it was held, that A. might sue the company for breach of the contract, though not under seal. *Henderson v. Australian, &c. Steam Navigation Co.*, 5 E. & B. 409; 24 L. J., Q. B. 322. So, where the same company contracted with the defendant by parol, for the supply to the company of a quantity of ale; the ale was delivered and paid for by the company, but turned out to be unfit for use: it was held, that the defendant was liable, although the contract was not under the seal of the company. *Australian, &c. Steam Navigation Co. v. Marzetti*, 11 Exch. 228; 24 L. J., Ex. 273; see also *Reuter v. Electric Telegraph Co.*, 6 E. & B. 341; 26 L. J., Q. B. 46. A company incorporated under the Companies Act, 1862, for the working of collieries, contracted with an engineer for the supply of engines for that purpose, and paid him part of the price; it was held that the company could sue for a breach of such contract although it was not under seal. *S. of Ireland Colliery Co. v. Waddle, supra*. See also *In re Contract Cor.*, L. R., 8 Eq. 14.

But where, although the company is a trading one, the contract is not within the scope of its business, it does not fall within the exception. *Copper Miners' Co. v. Fox*, 16 Q. B. 229; 20 L. J., Q. B. 175. And *quære*—whether the contract, even if by deed, would have been binding on the company, as it was *ultra vires*? *Vide ante*, p. 666. In the case of *London Dock Co. v. Sinnott*, 8 E. & B. 347; 27 L. J., Q. B. 129, it was held, that the plaintiffs (a dock company incorporated by statute) could not sue on the defendant's refusal to execute a formal contract for scavenging the docks, his promise to do so not having been accepted by the plaintiffs under seal. "This has been distinguished from the other cases on the ground that it was not a contract of a mercantile character; it was not a contract for work done by the defendant for the company, but a contract to enter into another contract. L. R., 3 C. P. 471, *per* Bovill, C.J.

Where the corporation is not a trading one, the rule laid down by Alderson, B., *supra*, seems to be still correct, at least where the contract is *executory*. Thus, a contract for the engagement of a clerk to the master of a workhouse by a board of guardians must, to bind them, be under their common seal. *Austin v. Bethnal Green Guardians*, L. R., 9 C. P. 91.

So, in the case of a contract by a municipal corporation for letting tolls. *Kidderminster, Mayor, &c. of, v. Hardwick*, L. R., 9 Ex. 13, or for accepting the surrender of a lease, and granting a fresh one. *Oxford, Mayor of, v. Crow*, (1893) 3 Ch. 535. But, where the contract falls within the purposes for which the corporation was created and has been *executed*, if the corporation have received the goods or accepted the benefit of the contract, it has been held that the objection that the contract is not under seal is then no longer tenable; as where buildings are erected, or goods supplied, for the inmates of the workhouse on the order, properly given, of guardians. *Sanders v. St. Neot's Union*, 8 Q. B. 810; *Clarke v. Cuckfield Union*, 21 L. J., Q. B. 349; *Nicholson v. Bradfield Union*, L. R., 1 Q. B. 620; *Lawford v. Billericay Rural District Council*, (1903) 1 K. B. 772, C. A. See also *Young v. Cor. of Leamington*, *infra*, and the cases there cited. An implied promise by a corporation to pay for work done for them, *extra* a contract, can only arise in such cases as it would be competent to them to contract by parol. *Lamprell v. Billericay Union*, 3 Exch. 283.

Use and occupation lies at the suit of a corporation; *Rochester, Dean, &c. of, v. Pierce*, 1 Camp. 466; *Stafford, Mayor of, v. Till*, 4 Bing. 75: and see *Ecclesiastical Comrs. v. Merrall*, L. R. 4 Ex. 162; and, against a corporation which has actually occupied under a parol contract; *Lowe v. L. & N. W. Ry. Co.*, 18 Q. B. 632; 21 L. J., Q. B. 361; but if the corporation cease to occupy, and quit, even without notice to quit, they cannot be charged as on an implied engagement to hold from year to year; for such a contract must be by deed; and payment of a quarter's rent after quitting does not affect the question of further liability. *Finlay v. Bristol & Exeter Ry. Co.*, 7 Exch. 409; 21 L. J., Ex. 117.

As to the presumption of contracts, made on behalf of a corporation, being made in pursuance of a statutory power, see cases cited *post*, p. 1126. A corporation may be bound in equity by acquiescence, in respect of a matter as to which they could at law be bound only by deed. *Crook v. Seaford, Cor. of*, L. R., 6 Ch. 551. See also *Melbourne Banking Cor. v. Brougham*, 4 Ap. Ca. 156, J. C. Under the Public Health Act, 1875 (38 & 39 V. c. 55), s. 174, every contract made under that Act, by an urban authority, of which the value exceeds 50*l.*, must be in writing, under their common seal. Such a contract is void unless so authenticated, although authorized and ratified by the authority; *Hunt v. Wimbledon Local Board*, 4 C. P. D. 48, C. A.; and even although it have been executed, and be necessary for them. *Young v. Leamington Cor.*, 8 Ap. Ca. 517, D. P. It is not sufficient that it has been entered into by an agent appointed under seal. S. C. The section, however, applies only to a contract, the parties to which, at the time of entering into it, contemplate that it shall exceed 50*l.* *Eaton v. Basker*, 7 Q. B. D. 529, C. A. See also on this section, *Att.-Gen. v. Gaskill*, 22 Ch. D. 537. A contract with A. sealed by the urban authority, after it has been partially executed, is enforceable, where the consideration for the sealing is that A. should complete the contract. *Mellis v. Shirley, &c. Local Board*, 14 Q. B. D. 911; *Brooks Jenkins & Co. v. Torquay Cor.*, (1902) 1 K. B. 601; or it has been said, without such consideration. *Id.* 607, *per* Walton, J.

Where the contract is of such a nature that, to bind the corporation, it must be entered into by deed, it is, if entered into by parol, void against the other party for want of mutuality, and the corporation cannot enforce it. *Copper Miners' Co. v. Fox*; *London Dock Co. v. Sinnott*, *ante*, p. 1092; and *Kidderminster, Mayor, &c. of, v. Hardwick*, *supra*. The defence of the want of a deed would now require to be pleaded specially, see Rules, 1883, O. xix., rr. 15, 20, *ante*, pp. 309, 310. As to claim by promoters, &c., for expenses incurred in forming a company, *vide post*, p. 1111.

See further as to the statutory authority of directors, &c., to enter into

contracts on behalf of companies constituted under the several statutes, *post*, pp. 1109, 1115, 1125.

A contract which is *ultra vires* will not bind the corporation, although ratified by all its members. *Riche v. Ashbury Ry. Carriage, &c. Co.*, L. R., 7 H. L. 653; *Wenlock, Ly. v. River Dee Co.*, 10 Ap. Ca. 354, D. P.; *Mann v. Edinburgh N. Tramways Co.*, (1893) A. C. 69, D. P. Nor is the corporation bound by a consent judgment, founded on such contract. *Gt. N. W. Central Ry. Co. v. Charlebois*, (1899) A. C. 114, J. C.

A corporation having only limited powers cannot be bound by estoppel, or otherwise, by an act done on its behalf beyond such powers. *Chapleo v. Brunswick Building Soc.*, 6 Q. B. D. 696, 712, 713. It may, however, be liable for damages caused by the misrepresentation of its servant made on its behalf within the scope of his apparent authority, see *Ruben v. Gt. Fingall Consolidated*, (1904) 2 K. B. 712, *per* C. A., dissenting from *rationes decidendi* in *British Mutual Banking Co. v. Charnwood Forest Ry. Co.*, 18 Q. B. D. 714, C. A. As to the authority of the secretary of a company to make representations on behalf of the company, see *Barnett v. S. London Tramways Co.*, 18 Q. B. D. 815, C. A.; *George Whitechurch v. Cavanagh*, *post*, p. 1120; *Ruben v. Gt. Fingall Consolidated*, *ubi supra*, *affirm.*, (1906) A. C. 439.

By the B. of Ex. Act, 1882, s. 91 (2), *ante*, p. 350, in the case of a bill of exchange, cheque, or note, the seal of a corporation is equivalent to signature.

As to a signed minute being a sufficient memorandum of a contract, under the Stat. of Frauds, *vide post*, p. 1110.

As to proof of deeds executed by a corporation, and as to priority of such deeds when executed on same day, *vide ante*, p. 132.

For breach of a contract to take debentures, damages only are recoverable. *S. African Territories v. Wallington*, (1898) A. C. 309, D. P.

Torts by corporations.] Trover is sustainable against a corporation as such; see cases, *ante*, p. 977; so is an action for a false return; *Argent v. S. Paul's, Dean of*, cited 16 East, 7; or for a distress; *Smith v. Birmingham, &c. Gas Co.*, 1 Ad. & E. 526; or for a trespass; *Maund v. Monmouth Canal Co.*, 4 M. & Gr. 452; or for negligence; *Cowley v. Sunderland, Mayor of*, 6 H. & N. 565; 30 L. J., Ex. 127. So, an action will lie against a corporation for negligently keeping a mischievous animal, if knowledge of its mischievous propensities be brought home to some one in the company's employ, having authority in the matter. *Stiles v. Cardiff Steam Navigation Co.*, 33 L. J., Q. B. 310. A corporation may be liable for intentional acts of misfeasance by its servants, provided the acts are connected with the scope and objects of its incorporation; as where the defendants were a company established for conveying passengers in omnibuses, for wilfully molesting the plaintiff's carriages on the highway, by driving the defendant's carriages so as to obstruct the plaintiff in the use of his own. *Green v. L. General Omnibus Co.*, 7 C. B., N. S. 290; 29 L. J., C. P. 13; *Limpus v. Id.*, 1 H. & C. 526; 32 L. J., Ex. 34, Ex. Ch. An action for libel lies against a railway or telegraph company for sending defamatory matter by telegraph, *Whitfield v. S. E. Ry. Co.*, E. B. & E. 115; 27 L. J., Q. B. 229; or otherwise publishing it. *Gwynn v. S. E. Ry. Co.*, 18 L. T. 738, *cor.* Cockburn, C.J. A corporation is liable for a malicious libel published by its servant in the course of his employment, although the occasion was privileged; *Citizens Life Assur. Co. v. Brown*, (1904) A. C. 423, 427, *vide ante*, p. 860. And it seems that an action will lie against a corporation for a malicious prosecution, *vide ante*, p. 882.

Trespass lies against a corporation aggregate for an assault or false imprisonment committed by its servant authorized by it to do the act, although such authority was not given by an instrument under seal. *Goff v. G. N.*

Ry. Co., infra, and see the above and following cases. An assault committed on behalf of and for the benefit of a corporation is capable of being ratified by it, and, if ratified, renders it liable in trespass for the act; *E. Counties Ry. Co. v. Broom*, 6 Exch. 314; 20 L. J., Ex. 196, Ex. Ch.; as where the servant of a railway company took the plaintiff, a passenger upon the company's line, into custody, for an alleged breach of one of the company's bye-laws, and carried him before a magistrate; the only evidence of ratification was that the attorney of the company attended before the magistrate to conduct the charge: it was held, that this was not evidence that the company ratified the act of their servant. S. C.; *Walker v. S. E. Ry. Co.*, L. R., 5 C. P. 640; see also *Roe v. Birkenhead, &c. Ry. Co.*, 7 Exch. 36; 21 L. J., Ex. 9. The plaintiff's quicks had been carried on defendant's railway, and planted at one of its stations by leave of F., the general superintendent of the company. Plaintiff demanded the quicks from F., and the managing director, and on their refusal to allow him to remove them, he brought trover for them: held, that it was the duty of a railway company to have on the spot some person with authority to act on its behalf in all cases, as the exigency of the traffic might require: that there was sufficient evidence that F. had authority to bind the company in all matters within the course of its ordinary business: and that the quicks having been left with defendant in the course of its business as carrier, there was evidence of a conversion by it. *Giles v. Taff Vale Ry. Co.*, 2 E. & B. 822; 23 L. J., Q. B. 43, Ex. Ch.; see also *Glover v. L. & N. W. Ry. Co.*, 5 Exch. 66. So, where the plaintiff had taken a return ticket on the defendant's railway, and at the end of the return journey by mistake gave up an old half ticket. The superintendent of the line, after hearing the matter, directed a constable to take the plaintiff to the station-house. It was held, on similar grounds to those expressed in *Giles v. Taff Vale Ry. Co., supra*, having regard to the powers conferred on the company by 8 & 9 V. c. 20, ss. 103, 104, in certain cases to detain persons travelling on the railway, there was evidence that the superintendent acted under the authority of the company, and that it was liable in trespass. *Goff v. Gt. N. Ry. Co.*, 3 E. & E. 672; 30 L. J., Q. B. 148. So, where the plaintiff on the return journey left the train at a station E., short of that, N., at which the ticket was issued, and was illegally arrested by the station inspector under the above sections, for refusing to pay the fare from E. to N., the company was held liable. *Moore v. Metropolitan Ry. Co.*, L. R., 8 Q. B. 36. See also *Smith v. S. E. Ry. Co.*, L. R., 5 C. P. 640, 645; *Bayley v. Manchester, &c. Ry. Co.*, L. R., 8 C. P. 148, Ex. Ch. In these cases it lies on the company to rebut the authority with which the officer *prima facie* appears to be invested by it. *Moore v. Metropolitan Ry. Co., supra*.

But, where a station-master directed the plaintiff's arrest under circumstances in which the company was not empowered to arrest him, it was held that no authority to the station-master to make the arrest could be inferred, and that the company were therefore not liable. *Poulton v. L. & S. W. Ry. Co.*, L. R., 2 Q. B. 534. The 8 & 9 V. c. 20, s. 154, permits the arrest of "any person who shall have committed any offence against the provisions of this or the special Act, and whose name and residence shall be unknown;" but this does not authorize the arrest of a person for merely the breach of a bye-law made under the powers of sects. 109 *et seq.* *Barry v. Midland Ry. Co.*, I. R., 1 C. L. 103, Ex. Ch. And it would seem, that in such case the distinction laid down in *Poulton v. L. & S. W. Ry. Co., supra*, would apply, and that without express ratification of an arrest made by its servants, the company would not be liable. Where a railway porter arrested a fellow-servant on a charge of stealing the company's property, it was held that he was not acting within the scope of his authority, and that the company

was not liable. *Edwards v. L. & N. W. Ry. Co.*, L. R., 5 C. P. 445. See also *Allen v. L. & S. W. Ry. Co.*, L. R., 6 Q. B. 65; *Walker v. S. E. Ry. Co.*, L. R., 5 C. P. 640; *Bolingbroke, Ltd. v. Swindon Local Board*, L. R., 9 C. P. 575; and *Bank of New S. Wales v. Owston*, 4 Ap. Ca. 270, J. C.

As to how the bye-law of a company may be proved, *vide ante* p. 101.

By sect. 139 (*post*, p. 1118), railway companies may in certain cases make tender of amends and plead the same as a defence.

As to fraud by corporations, see *National Exchange Co. of Glasgow v. Drew*, 2 Macq. 103; and cases cited *ante*, pp. 848, 849.

2. Companies registered under the Companies Acts, 1862 to 1900.

The Companies Act, 1862 (25 & 26 V. c. 89), repeals (sect. 205, and Sch. 3) former Acts as to joint stock companies, but sect. 206 saves acts done and liabilities incurred under those Acts, and the incorporation of companies registered under them, and Table B annexed to the Joint Stock Co.'s Act, 1856 (19 & 20 V. c. 47), so far as it applies to any company existing at the commencement of this Act; see also sects. 194, 195. The act does not repeal the stat. 7 G. 4, c. 46 (*post*, p. 1127), relating to banking companies, nor the Acts relating to the incorporation of companies by special act of Parliament, charter, or letters patent. The sections referred to under this heading are, unless otherwise stated, those of the Cos. Act, 1862.

Sect. 3. For the purposes of the Act a company carrying on the business of insurance in common with any other business is to be deemed an insurance company.

Sect. 4. No partnership of more than ten persons shall be formed after November 1st, 1862, for the purpose of banking, unless registered under this act, or formed under an act of Parliament or letters patent; and no company or partnership consisting of more than 20 persons shall be formed, for the purpose of carrying on any other business that has for its object the acquisition of gain, by the company or its members, unless registered under this act, or formed in pursuance of some other act of Parliament or of letters patent, unless it be a mining company within the jurisdiction of the Stannaries. Banking partnerships were previously limited to six persons, see sect. 205, and sect. 3.

The cases decided on this section will be found *ante*, pp. 666, 667. As to mining companies, see the Stannaries Act, 1869, *post*, p. 1127.

Sect. 6. Any association of seven or more persons by subscribing their names to a memorandum of association may form an incorporated company with or without limited liability. This subscription may be made by an orally authorized agent. *In re Whitley Partners*, 32 Ch. D. 337, C. A. By registration of the memorandum the company becomes a body corporate; sect. 18.

There are provisions in the act enabling a company to change its name: sect. 13; as to this section, *vide post*, p. 1107. By stat. 53 & 54 V. c. 62, the memorandum of association may now in some cases be varied.

The Cos. Act, 1862, by ss. 175—177 (except Sch. 1, Table A, *vide post*, p. 1099, n.) is to apply to companies formed and registered, or registered only, under the Joint Stock Cos. Acts, 19 & 20 V. c. 47; 20 & 21 V. c. 14; and the Joint Stock Banking Cos. Act, 20 & 21 V. c. 49; and the 21 & 22 V. c. 91; except that "the date of registration" is to refer to the registration under the former acts. The act does not apply to companies registered under 7 & 8 V. c. 110, *post*, p. 1114, except in the case of those companies which were re-registered under the repealed section 19 & 20 V. c. 47, s. 110, or the substituted provision 20 & 21 V. c. 14, s. 27.

The act does not affect banking companies formed under 7 G. 4, c. 46, and not registered since; but as banking companies formed under 7 & 8 V. c. 113, were required to be registered under the 20 & 21 V. c. 49 (s. 4), these companies fall within the operation of the Cos. Act, 1862. *Vide post*, p. 1127.

The Cos. Act, 1867 (30 & 31 V. c. 131), is (by sect. 2) to be, so far as is consistent with the tenor thereof, construed as one with the Cos. Act, 1862; the Cos. Acts, 1877, 1879, and 1880, are to be so read with the Cos. Acts, 1862, 1867; and the Companies Act, 1900, 63 & 64 V. c. 48, is (by sect. 32) to "have effect as part of the Companies Act, 1862"; it (by sect. 31) applies except as otherwise expressed to every company whether formed before or after Jan. 1st, 1901. The 53 & 54 V. cc. 62, 63, are to be construed with all these acts, and so is *Id.* c. 64, *ante*, p. 846.

As to the effect of the J. Act, 1875, s. 10, *ante*, p. 308, on an insolvent company in liquidation, *vide ante*, pp. 906, 907, and *post*, pp. 1112, 1162. The insolvency of such company is assumed, until the contrary is proved. *Ex pte. Theys*, 25 Ch. D. 587, 591, *per* Ld. Selborne, C. See also the Preferential Payments in Bankruptcy Act, 1888, 51 & 52 V. c. 62, s. 1 (4), and 6 E. 7, c. 58, s. 5 (3).

[*What certificates and documents are evidence.*] By the Cos. Act, 1900, s. 1 (1) replacing *Id.* 1862, s. 18, "a certificate of incorporation given by the registrar in respect of any association," whether before or after Aug. 8th, 1900 (sect. 1 (4)) shall be conclusive evidence that all the requisitions of this Act, in respect of registration, and of matters precedent and incidental thereto have been complied with, and that the association is a company authorized to be registered and duly registered under the Companies Acts." See *Oakes v. Turquand*, L. R., 2 H. L. 325; *Peel's case*, L. R., 2 Ch. 674. This section makes the certificate conclusive although the memorandum of association was not signed by seven persons. A new certificate is necessary to give effect to a change of name under sect. 13. *Shackleford v. Dangerfield*, L. R., 3 C. P. 407. The Cos. Act, 1862, ss. 31, 37, relating to certificates of shares, and the share register, are cited *post*, pp. 1099, 1098.

By sect. 67, the company shall cause minutes of all resolutions and proceedings of general meetings of the company, and of directors or managers, if any, to be duly entered in books, to be from time to time provided for the purpose; and any such minute, if purporting to be signed by the chairman of the meeting at which the resolutions were passed, or by the chairman of the next meeting, shall be received as evidence in all legal proceedings; and until the contrary is proved, every general meeting in respect of the proceedings of which minutes have been so made shall be deemed to have been duly held and convened; and all resolutions to have been duly passed; and all appointments of directors, managers, or liquidators deemed to be valid, and their acts valid, notwithstanding any defect afterwards discovered in their appointments or qualifications. See *York Tramways Co. v. Willows*, 8 Q. B. D. 685, C. A.; *In re Indian Zoedone Co.*, 26 Ch. D. 70, C. A., and cases decided on analogous acts, cited *post*, p. 1124.

By sects. 56—60, inspectors may be appointed by the Board of Trade or the company to examine into the affairs of the company; and by sect. 61, "a copy of the report of any inspectors appointed under this act, authenticated by the seal of the company into whose affairs they have made inspection, shall be admissible in any legal proceeding, as evidence of the opinion of the inspectors in relation to any matter contained in such report."

By sect. 154, "where any company is being wound up, all books, accounts, and documents of the company and of the liquidators shall, as between the contributories of the company, be *prima facie* evidence of the truth

of all matters purporting to be therein recorded." See *Ex pte. Kennedy*, 44 Ch. D. 472.

Sect. 175, and subsequent sections, provide for the registration of existing companies, *ante*, p. 1096. As to the evidence of such registration see the Cos. Act, 1900, s. 1, *ante*, p. 1097.

By the Cos. Act, 1877 (40 & 41 V. c. 26), s. 6, "any certificate of the incorporation of any company given by the registrar or by any assistant registrar for the time being shall be received in evidence as if it were the original certificate," and any copy of or extract from any of the documents or part of the documents kept and registered at any of the offices for registration of joint stock companies, if duly certified to be a true copy under the hand of the registrar or one of the assistant registrars, and whom it shall not be necessary to prove to be such, shall be received in evidence as of equal validity with the original document.

By 53 & 54 V. c. 62, s. 2, when a company has altered its memorandum of association, &c., under that Act, the registrar shall register a copy of the altered memorandum, &c., and of the order of court authorizing it, and his certificate of such registration "shall be conclusive evidence that all the requisitions of this act with respect to such alteration and the confirmation thereof have been complied with."

Register of shareholders.] By sect. 23, the subscribers of the memorandum of association are to be deemed to have agreed to become members, and upon the registration of the company are to be entered as members on the register; and every other person who has agreed to become a member, and whose name is entered on the register, is to be deemed a member.

By sect. 25, the company are to keep a register of members, in which the following particulars are to be entered: The names, addresses, and occupations (if any) of the members of the company, and where the capital is divided into shares, the shares held by each of them, distinguishing each share by its number; the amount paid, or agreed to be considered as paid, on the shares of each member; the date at which the name of any person was entered in the register as a member; the date at which any person ceased to be a member.

By sect. 26, in the case of a company having capital divided into shares, once in every year a list is to be made of all persons who, on the 14th day succeeding the day on which the ordinary general meeting of the company, or, if there is more than one ordinary meeting in each year, the first of such ordinary general meetings, is held, are members of the company; and such list is to state the names, addresses, and occupations of all the members therein mentioned, and the number of shares held by each of them, and is to contain a summary specifying the following particulars: The amount of the capital of the company, and the number of shares into which it is divided; the number of shares taken from the commencement of the company up to the date of the summary; the amount of calls made on each share; the total amount of calls received; the total amount of calls unpaid; the total amount of shares forfeited; the names, &c., of the persons who have ceased to be members since the last list was made, and the number of shares held by each. The list is to be completed within seven days after such 14th day; and a copy thereof is to be forthwith forwarded to the registrar of joint stock companies.

By sect. 37, "the register of members shall be *prima facie* evidence of any matters by this Act directed or authorized to be inserted therein."

Evidence of title to shares and of membership.] By sect. 30, "no notice of any trust, express, implied, or constructive, shall be entered on the register or be receivable by the registrar." It follows that no notice to the company is

necessary to perfect the title of an equitable owner of shares, for notice to the company of an equitable mortgage has, by reason of this section, been held to be of no effect as between successive mortgagees of the company's shares. *Société Générale de Paris v. Tramways Union Co.*, 11 Q. B. D. 424, C. A.; *accord*, *S. C.*, *sub nom. Id. v. Walker*, 11 Ap. Ca. 30, 31, *per* Ld. Selborne, where the judgment was, however, affirmed in D. P. on other grounds. But notice to the company of such a mortgage prevents the company from setting up in respect of subsequent liabilities to them, a lien on the shares, conferred by their articles of association. *Bradford Banking Co. v. Briggs, & Co.*, 12 Ap. Ca. 29, D. P. Such a lien arises only in respect of a debt due from the registered owner of the shares and not in respect of a debt due from P. the equitable owner. *Ex pte. Mexican, & Mining Co.*, 24 Q. B. D. 613, C. A. As to waiver of such lien, see *Bank of Africa v. Salisbury Gold Mining Co.*, (1892) A. C. 281, J. C. As to an equitable title to shares, see *Roots v. Williamson*, 38 Ch. D. 485; *Moore v. N. W. Bank*, (1891) 2 Ch. 599; and *Ireland v. Hart*, (1902) 1 Ch. 522.

By sect. 14, articles of association are to accompany the memorandum on registration. Although not duly signed as required, their adoption by the company may be proved by long acquiescence. *Ho Tung v. Man On Insur. Co.*, (1902) A. C. 232, J. C.

By sect. 15, in the case of a company limited by shares, if there are no articles of association, or if they do not exclude or modify Sch. 1, Table A,* the regulations contained in it are to be taken as regulations of the company; and by Cls. (18) (19), the instrument of transfer of shares is to be executed both by transferor and transferee, and is to be in the form prescribed, which, it may be observed, although required to be signed by the parties and attested, need not be under seal; and the transferor is to be deemed to remain the holder until the name of the transferee is entered on the register. Where, however, the transferee has, in fact, agreed to accept the shares, the non-execution of the transfer by him is an irregularity only, and he becomes shareholder on registration of the transfer. *In re Taurine Co.*, 25 Ch. D. 118, C. A.

Where the owner A. of shares in a company the shares of which are transferred by an instrument under hand only, deposits with B., as security for a loan by B., the certificates of the shares and a transfer of them, with the name of the transferee in blank, B. is equitable mortgagee and has authority to acquire the legal title to the shares by filling in his own name and registering the transfer, but he cannot delegate the like authority to C. to fill up the transfer for a purpose foreign to the original contract; C. cannot therefore hold them as security for more than A.'s debt. *France v. Clark*, 26 Ch. D. 257, C. A., distinguishing *Roffe v. Roscoe*, C. A., cited, *Id.* 260, 265, and explaining *Ex pte. Sargent*, L. R., 17 Eq. 273. See also, *Easton v. L. Joint Stock Bank*, 34 Ch. D. 95, C. A., reversed in D. P. on another ground, *sub nom. Sheffield, Earl of, v. Id.*, 13 Ap. Ca. 333, and *Ireland v. Hart*, *supra*. The owner A. is under an implied obligation not to interfere with the registration of the shares to any person D., whose name has been lawfully inserted for value in the blank transfer; if he do so, he is liable to D. for the damages D. has sustained by delay in registration thereby caused. *Hooper v. Herts*, (1906) 1 Ch. 549, C. A. As to how these damages are to be estimated, *vide, Id.* pp. 562, 564. See further, *ante*, pp. 963, 964. Where shares are assignable by deed only, a transfer in blank conveys no title, *vide ante*, p. 136.

By sect. 24, a transfer of a deceased member may be made by his personal representatives, although the latter be not a member. See *Buchan's case*, 4 Ap. Ca. 549, 588, 589, 594, *per* Lds. Cairns and Selborne.

* Table A was revised as from Oct. 1st, 1906, by an Order of the Board of Trade, dated July 30th, 1906, made under the power conferred by the Cos. Act, 1862, s. 71. See W. N., (1906), Part II. p. 233.

By sect. 31, "a certificate under the common seal of the company specifying any share or shares, or stock held by any member of a company, shall be *prima facie* evidence of the title of the member to the share or shares or stock therein specified." On such certificate a statement is usually printed, under the requirements of the Stock Exchange, that transfer of those shares cannot be made without its production; if, however, the Company J., acting in good faith, register a transfer without its production, J. incurs no liability to the equitable mortgagee of the shares who, as such, holds the certificate, together with another transfer not registered. *Rainford v. James Keith, &c. Co.*, (1905) 1 Ch. 296; reversed, (1905) 2 Ch. 147 on the facts, the C. A. not deciding the above point.

As to the effect of a share certificate, as an estoppel against the company, see *In re Bahia & Francisco Ry. Co. & Hart v. Frontino, &c. Gold Mining Co.*, cited *post*, p. 1119. As to the effect of "certification" on a transfer, see *Bishop v. Balkis Consolidated Co.*, cited *post*, p. 1120. As to the effect of forged transfers, and as to warranty of genuineness of transfer of shares sent to company for registration, see cases collected *post*, pp. 1119, 1120. The register, if made in accordance with the requirements of the Act, and having the name of the member on it, may be used as *prima facie* evidence of membership. Sect. 37, *ante*, p. 1098. But such evidence may always be rebutted, and the defendant in an action for calls may show that there was no agreement binding him to take shares.

[*Shareholders or members liable to calls.*] An applicant for shares does not become a member until shares have been actually allotted to him in accordance with his application, and he has received notice, actual or constructive, of such allotment; until such notice, he is at liberty to withdraw his application for shares, and is not afterwards bound to accept an allotment. *Hebb's case*, L. R., 4 Eq. 9; *Sahlgren and Carrall's case*, L. R., 3 Ch. 323; *Robinson's case*, L. R., 4 Ch. 322, 330; *Ritso's case*, 4 Ch. D. 774, C. A.; see also *Ex pte. Jones, infra*. The withdrawal may be orally given to a clerk at the company's office in the absence of the secretary. *Truman's case*, (1894) 3 Ch. 272. So, if the notice of allotment be conditional or impose a new term on the applicant; *Jackson v. Turquand*, L. R., 4 H. L. 305; *Pentelow's case*, L. R., 4 Ch. 178; distinguished in *Peek's case*, *Id.* 532; or, be not made within a reasonable time from the time of application; *Rumsgate Victoria Hotel Co. v. Goldsmid*, L. R., 1 Ex. 109; *Baily's case*, L. R., 3 Ch. 592; he may repudiate the shares allotted. See also *Howard's case*, L. R., 1 Ch. 561; and *Gustard's case*, L. R., 8 Eq. 438. The mere fact of a person being director does not dispense with notice of allotment of shares, for which he had not applied and was not bound under the articles (*vide post*, p. 1102) to take. *Hallmark's case*, 9 Ch. D. 329, C. A. An executor is personally liable on shares which have been allotted to him in right of his testator, and accepted by the executor. *Fearnside and Dean's case*, L. R., 1 Ch. 231; *Jackson v. Turquand, supra*. As to conditional applications for shares, and collateral agreements to set off calls in payment of goods, see *Roger's case*, L. R., 3 Ch. 633; *Bridger's case*, L. R., 5 Ch. 305; *Black & Cos. case*, L. R., 8 Ch. 254; *Fisher's case*, 31 Ch. D. 120, C. A.

In those cases in which the notice of allotment can properly be sent by post, as where the letter of application has been sent by post, the contract is complete as soon as the notice of allotment has been posted to the applicant, properly addressed; *Harris's case*, L. R., 7 Ch. 587; even although it does not reach the applicant. *Household, &c. Insur. Co. v. Grant*, 4 Ex. D. 216, C. A. If the address given by the applicant be followed, that, although imperfect, will be sufficient to satisfy this rule. *Townsend's case*, L. R., 13 Eq. 148. A letter withdrawing the application for shares must, to be effectual, be received

by the company before the notice of allotment is posted. *Ex pte. Jones*, (1900) 1 Ch. 220. The allottee is liable although the shares have not been appropriated to him by numbers. *Adam's case*, L. R. 13 Eq. 474. Where shares have been allotted on A.'s application to a fictitious person, or one incapable of contracting, A. is liable. *Pugh & Sharman's case*, *Id.* 566. But, where A. has applied for shares in B.'s name without B.'s authority, A. is not liable as a shareholder. *Coventry's case*, (1891) 1 Ch. 202, C. A. And a contract to place shares, is not a contract to take shares. *Gorissen's case*, L. R., 8 Ch. 507. An "underwriting" agreement by A. for a certain number of shares, means an agreement, entered into before the shares are offered to the public, to take an allotment of so many of that number of shares as have not been taken up by the public; but whether or not such last-mentioned number may be allotted to A. without any further application depends on the construction of the particular agreement. See *Ex pte. Audain*, 42 Ch. D. 1, C. A.; *Ormerod's case*, (1894) 2 Ch. 474; *Ex pte. Stark*, (1897) 1 Ch. 575, C. A.; *Hindley's case*, (1896) 2 Ch. 121; *Carmichael's case*, *Id.* 643, C. A. Where, by such agreement, made for good consideration, A. authorizes P. to apply for the number of shares in A.'s name, the authority is irrevocable, being coupled with an interest. S. C. As to the stamp on a letter of allotment, *vide ante*, p. 258.

If the allottee have dealt with the shares allotted as his own, he will be taken to have accepted the shares, and be concluded from repudiating them on the ground of no notice of allotment having been given to him. *Crawley's case*, L. R., 4 Ch. 322; see also *A. Levita's case*, L. R., 3 Ch. 36; *G. H. Levita's case*, L. R., 5 Ch. 489; see further the cases cited *post*, p. 1102, as to the qualification of directors.

It seems that sect. 23, *ante*, p. 1098, requires that the name of an allottee of shares should be entered on the register before he can become a shareholder; *Nicol, Tufnell, and Ponsonby's cases*, 29 Ch. D., 421 C. A.; *Ex pte. Cummeil*, (1894) 2 Ch. 392, C. A.; but that sect. 25, *ante*, p. 1098, is directory only. S. C.; *Adam's case*, *supra*; see also *East Gloucestershire Ry. Co. v. Bartholomew*, L. R., 3 Ex. 15, cited *post*, p. 1121. An allotment made at a meeting of a board of directors, of which other absent directors had not reasonable notice, is void against the allottees. *Ex pte. Smith*, 39 Ch. D. 546; *In re Portuguese, &c. Mines*, 42 Ch. D. 160, C. A. A director cannot waive the right to notice. *Id.* 168, *per* Ld. Esher, M.R. An allotment made at an informal board, and therefore void, may be ratified at a board properly convened; *La Compagnie de Mayville v. Whitley*, (1896) 1 Ch. 788, C. A.; or by the company; *Ex pte. Budman and Bosanquet*, 45 Ch. D. 16, C. A.; unless the allottee have previously withdrawn his application. *In re Portuguese Mines*, *supra*. Shares cannot be issued at a discount, even under a registered contract, *Ooregum Gold Mining Co., &c. v. Roper*, (1892) A. C. 125, D. P.; *In re Almada, &c. Co.* 38 Ch. D. 415, C. A.; and unless the allottee of shares so issued avoid the allotment prior to the liquidation of the company; *vide* S. C., and before he has dealt with the shares as a member of the company; *Ex pte. Sandys*, 42 Ch. D. 98, C. A., he is liable to the full amount of the shares. S. C.; *Welton v. Saffery*, (1897) A. C. 299, D. P. An allotment of shares made in contravention of the Cos. Act, 1900, s. 4, is voidable only, not void, *Finance, &c. Issue v. Canadian Produce Cor.*, (1905) 1 Ch. 37.

The subscribers of the memorandum are to be entered on the register as members of the company, although no shares have been actually allotted to them; *Evans' case*, L. R., 2 Ch. 427; *Hall's case*, L. R., 5 Ch. 707; *In re London, &c. Coal Co.*, 5 Ch. D. 525; provided there are shares which can be allotted to them. *Mackley's case*, 1 Ch. D. 247. In the absence of express agreement with the company, they are, however, only liable to pay on the shares in respect of calls made as provided by the articles of association. *Alexander v. Automatic Telephone Co.*, (1900) 2 Ch. 56, C. A. Their

obligation to take shares is not satisfied by the subsequent allotment to them of fully paid-up shares. *Migotti's case*, L. R., 4 Eq. 238; *De Beville's case*, L. R., 7 Eq. 11; *Forbes and Judd's case*, L. R., 5 Ch. 270; *Dent's case*, L. R., 8 Ch. 768. But, if the subscribers have paid for the shares in money's worth, that is sufficient. *Drummond's case*, L. R., 4 Ch. 772; *Pell's case*, L. R., 5 Ch. 11; *In re Baglan Hall Colliery Co.*, *Id.* 346; *Jones' case*, L. R., 6 Ch. 48; *Maynard's case*, L. R., 9 Ch. 60.

Where F. signed the memorandum and articles of association, and after signature by him, and without his knowledge, an alteration was made in the articles, F. was held released from his liability. *Ex pte. Felgate*, 2 D. J. & S. 456.

The articles of association usually provide that a director of a company must, as a qualification, be the holder of a specified number of shares, and in many cases the question has arisen, as to how far a person who has acted as a director, is precluded from repudiating the registration, in his name, of that number of shares. This question must be determined by all the circumstances of the transaction. In *Abercorn's (Ms. of) case*, 4 D. F. & 7, 78; 31 L. J., Ch. 828; and *Green's case*, L. R., 18 Eq. 428, it was held that the director had not by his acts bound himself to accept the shares. In *Leeke's case*, L. R., 6 Ch. 469; *In re Disderi & Co.*, L. R., 11 Eq. 242; *Isaacs' case*, (1892) 2 Ch. 158, C. A.; and *Molineaux v. L. Birmingham, &c. Insur. Co.*, (1902) 2 K. B. 589, C. A.; on the other hand, it was held that the director had so bound himself. This obligation to take shares is satisfied by the allotment of fully paid-up shares by the direction of any person entitled to them. *Brown's case*, L. R., 9 Ch. 102; *Carling's case*, 1 Ch. D. 115, C. A.; *In re Innes & Co.*, (1903) 2 Ch. 254, C. A. By the Cos. Act, 1900, sect. 3 (1), a director must "obtain his qualification within two months after his appointment or such shorter time as may be fixed by the regulations of the company." The acceptance of the office of director alone does not bind a person to become a shareholder, if he retract the acceptance before the reasonable time for acquiring the shares, and he never act. *Karuth's case*, L. R., 20 Eq. 506. And where the director is bound to acquire his qualification within three months, and acts as director, but retires before that time, he is not bound to take shares. *Salisbury, Jones and Dale's case*, (1894) 3 Ch. 356, C. A. So where the election of the director is void; *Jenner's case*, 7 Ch. D. 132, C. A.; even although the shares were allotted to him. *Barber's case*, 5 Ch. D. 963, C. A. And where the articles of association provide that the director's qualification shall be the holding of 250 shares, that he might act before acquiring it, but that if it be not acquired within three months, the office should be vacated, a director by acting for more than the three months does not agree to take, and is not liable to take, the 250 shares. *In re Whal Buller Consols*, 38 Ch. D. 43, C. A. See also *Ex pte. Cummell*, (1894) 2 Ch. 392, C. A. The same principles apply, where by the terms of appointment of a person to an office in a company, he is required to be the holder of a certain number of shares. *In re Richards and Home Assur. Assoc.*, L. R., 6 C. P. 591.

Directors cannot allot shares unless they have been duly appointed. *In re London, &c. Land Co.*, 31 Ch. D. 233, following *Howbeach Coal Co. v. Teague*, 5 H. & N. 151; 29 L. J., Ex. 137. although that case was somewhat doubted in *York Tramways Co. v. Willows*, 8 Q. B. D. 685, C. A. And where a director, who has been irregularly appointed, joins in allotting shares to himself, he is estopped from relying on the invalidity of the allotment arising from such irregularity. S. C. As to the appointment under Table A, Cl. (68), of the first directors, see these cases, *Ex pte. Kennedy*, 44 Ch. D. 472, and *John Morley Building Co. v. Barras*, (1891) 2 Ch. 386. Irregularity in the appointment of the directors may be cured by a clause in the articles of association validating the acts of *de facto* directors. *Dawson v. African Consolidated, &c. Co.*, (1898) 1 Ch. 6, C. A.; *British Asbestos Co. v. Boyd*,

(1903) 2 Ch. 439. See also *Boschoek Proprietary Co. v. Fake*, (1906) 1 Ch. 148. Directors must act by a resolution of a quorum of their number duly assembled at a board. *In re Hagercroft Gold, &c. Co.*, (1900) 2 Ch. 239, following *D'Arey v. Tamar, &c. Ry. Co.*, cited *post*, p. 1125. As to the disqualification of a director by his being concerned in a contract with his company, see *In re Bodega Co.*, (1901) 1 Ch. 277.

A member, A., of a company ceases to be such when he has duly transferred his shares to another person, B., whose name has been then entered on the register. An absolute transfer to a pauper is good, and relieves the transferor from liability to calls as a present member of the company; *De Pass's Case*, 4 D. G. & J. 544; 28 L. J., Ch. 769; *Ex pte. Bugg*, 2 Dr. & Sm. 452; 35 L. J., Ch. 43; *Master's case*, L. R., 7 Ch. 292; but if the transfer be colourable only, and the transferor retain an interest in the shares, the transferor remains liable. *Hyams' case*, 1 D. F. & J. 75; 29 L. J., Ch. 243; *Budd's case*, 30 Beav. 143; 3 D. F. & J. 297; *Ex pte. Kintrea*, L. R., 5 Ch. 95. So, where the transfer is to an infant; for the transferor remains liable, till there is on the register a transferee who is legally liable to the company. *Symon's case*, *Id.* 298. But, if the infant transfer to an adult and the transfer is registered, the liability of the original holder ceases as from the date of the registration of the transfer to the infant. *Gooch's case*, L. R., 8 Ch. 266. It is, of course, essential that the transfer should be accepted by the transferee. *Cartmell's case*, L. R., 9 Ch. 691. But it is not essential that the transfer should have been executed by him. *In re Taurine Co.*, 25 Ch. D. 118, C. A., *ante*, p. 1099. See also *Cuninghame v. City of Glasgow Bank*, 4 Ap. Ca. 607, D. P. As to acceptance of transfers on behalf of the company, see *Cartmell's case*, *supra*. The directors are bound to register any transfer duly executed, and can exercise no discretion as to the registration, unless such power is expressly given them by the articles of association. *Weston's case*, L. R., 1 Ch. 20. The duty of registration is merely ministerial, and it takes effect from the time the transfer is sent to the company's office. *In re Cawley*, 42 Ch. D. 209, C. A. But the directors are entitled to a reasonable time to consider the transfer before they register it. *In re Ottos Kopje Diamond Mines*, (1893) 1 Ch. 618, C. A. And proof *aliunde* that the stamp, though apparently sufficient, is not really so, is ground for refusing registration. *Maynard v. Consol. Kent Collieries Cor.*, (1903), 2 K. B. 121, C. A., cited *ante*, p. 222. The question of the non-registration of a transfer by the company, owing to the laches of the company, or of one of the parties, has usually arisen on an application to the court to remove the transferor from the list of contributories, and some of the principal cases are here collected for convenience of reference. *Shepherd's case*, L. R., 2 Eq. 564; L. R., 2 Ch. 16; *Marino's case*, L. R., 2 Ch. 596; *Ex pte. Parker*, *Id.* 685; *Fyfe's case*, L. R., 4 Ch. 768; *Robinson v. Chartered Bank*, L. R., 1 Eq. 32; *Walker's case*, L. R., 2 Eq. 554; *Shipman's case*, L. R., 5 Eq. 219; *Nation's case*, L. R., 3 Eq. 77; *Head's case*, *White's case*, *Id.* 84; *Ward and Garfil's case*, L. R., 4 Eq. 189; *Lowe's case*, L. R., 9 Eq. 589; *In re Sussex Brick Co.*, (1904) 1 Ch. 598, C. A.; see *Buttie's case*, 39 L. J., Ch. 391; *Gilbert's case*, L. R., 5 Ch. 559.

By the Cos. Act, 1867, s. 26, "a company shall, on the application of the transferor of any share or interest in the company, enter in its register of members the name of the transferee of such share or interest, in the same manner and subject to the same conditions, as if the application for such entry were made by the transferee."

A company is not bound to send notice to the transferor, of their refusal to register the transfer. *Gustard's case*, L. R., 8 Eq. 438.

"A deceased member or his estate remains a member for the purpose of the articles so long as his name remains on the register without notice to the

company of his death." *New Zealand Gold, &c. Co. v. Peacock*, (1894) 1 Q. B. 622, 633, *per* Davey, L.J.

A past shareholder is, subject to the limitations stated in sect. 38, liable to calls, if the company be wound up. *Vide post*, p. 1106.

In the case of joint ownership the liability to pay calls is a joint liability which survives. *Marwell's case*, 20 L. R., Eq. 585.

The action for a call is not barred by the previous issue of a balance order therefor. *Westmoreland, &c. Slate Co. v. Feilden*, (1891) 3 Ch. 15, C. A.

Calls.] The power to make calls, and the conditions for enforcing them, depend on the articles of association (if any), see sects. 14, 15, but if there are none or they do not exclude the regulations of Sch. 1, Table A, *vide ante*, p. 1099, n., by Cl. (12), the directors may from time to time make calls upon members in respect of any moneys unpaid on their shares, provided that no call shall exceed one-fourth of the nominal amount of the share or be payable at less than one month from the last call; and each member shall (subject to receiving at least 14 days' notice specifying the times of payment) pay to the Company at such times, the amounts so called.

By sect. 16, all moneys payable by a member to the company in pursuance of the regulations of the company are to be deemed a specialty debt; and by sect. 75, the liability to contribute to the assets of the company when wound up shall be deemed to create a debt of the nature of a specialty, accruing due from such person at the time when his liability commenced, but payable at the times when calls are made for enforcing the liability. The debts created by these sections bind the heirs of the contributory. *Buck v. Robson*, L. R., 10 Eq. 629.

By sect. 70, in an action by the company against a member for a call, or other moneys due from him as a member, the special matter need not be set forth, but it is sufficient to "allege that the defendant is a member of the company, and is indebted to the company in respect of a call made or other moneys due, whereby an action or suit hath accrued to the company."

By the Cos. Act, 1867, s. 25, "*Every share in any Company shall be deemed and taken to have been issued, and to be held, subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the registrar of joint stock companies, at or before the issue of such shares.*" The Cos. Act, 1900, s. 33 (1), repealed this section and by *Id.* (2) provided that no proceedings should be commenced thereunder after Dec. 31st, 1900. Sect. 7 (1 (b)), which applies only to limited companies, requires the filing of such a contract within a month after allotment, but the absence of the filing does not invalidate the contract, nor cause the shares to be treated as unpaid.

Under the Cos. Act, 1862, the shares must be wholly paid up in cash; *Ooregum Gold Mining Co., &c. v. Roper*, (1892) A. C. 125, D. P.; unless the company has agreed to accept some other consideration. *In re S. Frost & Co.*, (1899) 2 Ch. 207, C. A. Shares are not paid for in cash, unless the transaction would support a defence of payment. *Fothergill's case*, L. R., 8 Ch. 270; *Andress' case*, 8 Ch. D. 126, C. A.; *White's case*, 12 Ch. D. 511, C. A. *Secus*, where that defence is supported. *Spargo's case*, L. R., 8 Ch. 407; *Coates' case*, L. R., 17 Eq. 169; *N. Sydney, &c. Co. v. Higgins*, (1899) A. C. 263, J. C. See *Ferraro's case*, L. R., 9 Ch. 355. But in such case each party must have on the other a claim for present payment. *Kent's case*, 39 Ch. D. 259, C. A.; *In re Johannesburg Hotel Co.*, (1891) 1 Ch. 119, C. A. Hence a contract to take fully paid-up shares in satisfaction of a prior debt, cannot fall within this principle, for the allottee never contracted to make any payment. S. C. A contract to issue shares fully paid up, as a gift, is invalid. *In re Eddystone Marine Insur. Co.*, (1893) 3 Ch. 9, C. A.

If the articles provide that the directors shall receive and be registered as the holders of fully paid-up shares, they are not liable for unpaid shares. *Miller's case*, 3 Ch. D. 661; 5 Ch. D. 70, C. A. So on a contract by A. with the company to take paid-up shares, he cannot be compelled to accept unpaid shares; *Arnot's case*, 36 Ch. D. 702, C. A.; *In re Macdonald Sons & Co.*, (1894) 1 Ch. 89, C. A.; but if A. deal with such unpaid shares, when allotted to him, as a member of the company, he will be bound to pay them in full. *Ex pte. Sandys*, 42 Ch. D. 98, C. A. The issue of a certificate to A. stating that the shares are fully paid-up will, as against B., a *bonâ fide* transferee for value, without notice, estop the company from alleging that the shares have not been paid up. See *Burkinshaw v. Nicolls*, 3 Ap. Ca. 1004, D. P.; *In re Hall & Co.*, 37 Ch. D. 712; and *Parbury's case*, (1896) 1 Ch. 100. And C. who takes the shares from B., although without consideration and with notice, is in the same position as B. *Barrow's case*, 14 Ch. D. 432, C. A. Where, however, A., B., and C., all have notice that the shares have not been paid up in cash, no estoppel arises against the company. *In re London Celluloid Co.*, 39 Ch. D. 190, C. A. The issue of a certificate of fully paid-up shares, to B., as security for a loan made by him to the company on the terms that he should have such shares, which certificate was received by B. in the belief that the shares are so paid up, estops the company. *Bloomenthal v. Ford*, (1897) A. C. 156, D. P.

As to the recovery of interest on calls, *vide ante*, p. 626.

Calls can only be made by duly appointed directors; see *Garden Gully, &c. Mining Co. v. McLister*, 1 Ap. Ca. 39, J. C.; and by at least the minimum number of directors fixed by the articles for carrying on the business of the company. *Bottomley's case*, 16 Ch. D. 681. See also *Houbach Coal Co. v. Teague*, 5 H. & N. 151; 29 L. J., Ex. 137; and *In re London, &c. Land Co.*, 31 Ch. D. 223, *ante*, p. 1102.

Calls can be legally made so as to bind subscribers, although only a small portion of the shares are taken up; *Ornamental Woodwork Co. v. Brown*, 2 H. & C. 63; 32 L. J., Ex. 190; unless the articles expressly or impliedly prohibit the directors from carrying on the company until the whole or any given part of the capital is subscribed. *N. Stafford Steel, &c. Co. v. Ward*, L. R., 3 Ex. 172, Ex. Ch. If the articles declare that although the whole of the shares be not subscribed for, yet the registered members for the time being, *if the directors should by resolution so declare*, should be incorporated for carrying on the objects of the incorporation, the company cannot enforce a call unless all the shares have been subscribed for, or the resolution has been passed. S. C. See also *Peirce v. Jersey Waterworks Co.*, L. R., 5 Ex. 209, cited *post*, p. 1111. The resolution for a call must specify the amount of call and date for payment; *In re Cawley*, 42 Ch. D. 209, C. A.; if the date be omitted and be fixed by resolution at a later day, the call is complete on the later day only. S. C. See also *Johnson v. Lyttle's Iron Agency*, 5 Ch. D. 687, C. A. A contributory of a company, which is being voluntarily wound up, cannot, in an action against him for calls, rely on the fact that no notice was given to him that his name had been entered on the list of contributories. *Brighton Arcade Co. v. Dowling*, L. R., 3 C. P. 175.

The articles of association provided that any director who should accept or hold any office under the company other than that of manager, should therefrom be disqualified from being and should cease to be a director; A. was appointed secretary at a salary, and whilst secretary was elected a director and appointed on a committee to exercise certain powers of the directors; from that time he received salary as a committeeman, instead of as a secretary, though he continued to perform the duties of that office; it was held that A. did not hold an office under the company, so as to disqualify

him from being a party, as a director, to the making of a call. *Iron Ship Coating Co. v. Blunt*, L. R., 3 C. P. 484.

By a deed of settlement of a company the capital was to consist of 100*l.* shares. The company subsequently created 50*l.* shares, and the defendant afterwards purchased some of their shares, executed the deed, and received dividends. The company was afterwards registered under the 19 & 20 V. c. 47, and the defendant was sued for calls: held, that he was estopped from disputing the legality of the 50*l.* shares, and the company could sue for calls made before incorporation. *Hull Flax Co. v. Wellesley*, 6 H. & N. 38; 30 L. J., Ex. 5.

A deed of transfer of shares from A. to B., though invalid at law as a deed, on the ground that the particulars of the shares were not filled in until after execution by A., yet may, after execution by B., operate as a valid acceptance by B. of A.'s shares, and render B. liable to be entered on the register as a shareholder. *Ex pte. Contract Cor.*, L. R., 3 Ch. 105. So, where B. accepts a transfer of shares to him from L., which the directors register, although the transfer of the shares to L. is not registered till afterwards, after this last registration B. is liable as a shareholder. *Weikersheim's case*, L. R., 8 Ch. 831. A partner in a banking firm may accept on behalf of his firm a transfer of shares made to the firm, as security for an advance made by a firm. S. C. So a transfer of shares to a company may be accepted by execution by the manager for the company, though the acceptance is not under the seal of the company. *Royal Bank of India's case*, L. R., 4 Ch. 252. Where the assent of the directors of a company was required to each transfer, it was held that an assent given by mistake might be revoked; *Anderson's case*, L. R., 8 Eq. 509; so, where their assent was obtained by a fraudulent misstatement. *Payne's case*, L. R., 9 Eq. 223.

Cl. (20), Sch. 1, in Table A, makes it lawful for the directors to refuse to register the transfer of shares not being fully paid-up shares, to a person of whom they do not approve, or of shares on which the company has a lien. *Vide ante*, p. 1099, n. As to tender of payment for calls, together with transfer, see *Holden's case*, L. R., 8 Eq. 444.

A *quondam* shareholder may also show that his shares have been duly forfeited; by Cl. (28), Sch. 1, in Table A, *vide ante*, p. 1099, n., such forfeiture is made subject to the right of the company to recover calls then due, but this liability ceases when the company has received payment in full of the nominal amount of the shares. Such calls constitute a debt which is not affected by the subsequent liquidation of the company. *Ladies' Dress Assoc. v. Pulbrook*, (1900) 2 Q. B. 376, C. A. The forfeiture cannot be rescinded without the consent of the *quondam* shareholder. *Larkworthy's case*, (1903) 1 Ch. 711. Every company has, as incident to its existence, power to enter into a *bonâ fide* compromise with one of its members, who disputes that he is a shareholder, and as part of such contract to cancel his shares. *Bath's case*, 8 Ch. D. 334, C. A. But in no other case can a surrender of shares be made, the company releasing the shareholder from further liability in respect thereof, unless under circumstances which would entitle the company to forfeit the shares. *Bellerby v. Rowland, &c. S.S. Co.*, (1902) 2 Ch. 14, C. A. following *Trevor v. Whitworth*, *post*, p. 1111. See further as to ratification, cases cited *post*, p. 1111. In the event of a winding-up, a past member of a company is liable to calls, subject to the restrictions in sect. 38, even though his shares have been forfeited, either adversely for non-payment of calls; *Bridger's case* and *Neill's case*, L. R., 4 Ch. 266; *Creyke's case*, L. R., 5 Ch. 63; or on a valid compromise, *Bath's case*, *supra*. Where forfeited shares have been sold, the purchaser is liable to future calls to the amount unpaid on the shares. See *New Bullis Erstelling v. Randt Gold Mining Co.*, (1904) A. C. 165, D. P.; but he is entitled to

credit for any sums received by the company from the former holder in respect of the shares, after the forfeiture. *In re Randt Gold Mining Co.*, (1901) 2 Ch. 468.

A change of a company's name, under sect. 13, is not complete until it has been made on the register, and a new certificate of incorporation has been issued by the registrar; until then, the corporation exists under its old name. *Shackleford & Co. v. Dangerfield*, L. R., 3 C. P. 497. Hence, a call made by the company is, before the certificate is issued, to be sued for in the old name of the company; but notice of the call, given in the new name of the company to a shareholder who knew of the proposed change, is sufficient, as it in fact gave the defendant notice that the call had been made. *S. C.* Where after a call has been made, the company is wound up, the official liquidator may give notice of the call and sue therefor. *Stone v. City & County Bank*, 3 C. P. D. 282, C. A. Calls may be made by notice, sent to the shareholder's registered address, until the company have notice of his death. *New Zealand Gold, &c. Co. v. Peacock*, (1891) 1 Q. B. 622, C. A.

The holder of scrip certificates of a company issued "to bearer," is not liable to calls. *Ormerod's case*, L. R., 5 Eq. 110; *Ex pte. Collum*, L. R., 9 Eq. 236. See, however, as to these decisions, *McEuen v. W. London Wharves, &c. Co.*, *post*, p. 1122. See further, *post*, p. 1121. Although in a limited company the shareholders cannot, as regards the debts of the company, be liable beyond the amount unpaid on their shares, yet if the articles of association provide for the payment of sums of money by the members *inter se*, the limit does not apply to calls for such payment. *McKewan's case*, 6 Ch. D. 447, C. A.

Special defences in actions for calls.] Many of the defences that may be raised to the action by appropriate defences will be found under the respective heads in *Defences to actions of simple contract*, *ante*, pp. 658 *et seq.* The cases peculiarly applicable to the affection are, however, here collected; the arrangement of the subjects is alphabetical.

Fraud and misrepresentation.] In an action for calls the defendant cannot set up the fraud of the directors, unless he has repudiated his shares as soon as he discovered the fraud practised on him; *Deposit Life Assurance Co. v. Ayscough*, 6 E. & B. 761; 26 L. J., Q. B. 29; but if he have done so, the fraud affords a good defence. *Bwlch-y-Plwm Lead Mining Co. v. Baynes*, L. R., 2 Ex. 324. As to what will preclude a shareholder from repudiating his shares, *vide post*, p. 1113. Where the company falsely represented that its shares of 105*l.* each were paid up to the extent of 100*l.*, it was held that a shareholder who had bought shares on the faith of this statement, was liable only in the liquidation to pay 5*l.* a share. *Waterhouse v. Jamieson*, L. R., 2 H. L. Sc. 29.

The misrepresentation must come from an actual report put forward by the authority of the company, and not from the statements of directors, clerks, &c. *Ex pte. Frowd*, 30 L. J., Ch. 322; *New Brunswick, &c. Co. v. Conybear*, 9 H. L. C. 711; 31 L. J., Ch. 297; *Glamorganshire Iron, &c. Co. v. Irvine*, 4 F. & F. 947; *cor.* Willes, J. See also cases collected *ante*, p. 846. As to admission by the company of the misrepresentation, see *In re Derula Provident Gold Mining Co.*, 22 Ch. D. 593. Where the alleged fraud arises on the prospectus and articles of association, &c., it is a question for the jury whether these documents contained fraudulent misstatements which materially induced the defendant to take the shares. *Cleveland Iron Co. v. Stephenson*, 4 F. & F. 428; Cockburn, C.J. See also *Glamorganshire Iron, &c. Co. v. Irvine*, *supra*; *Addie v. W. Bank of Scotland*, L. R., 1 H. L. Sc. 145; *Venezuela Ry. Co. v. Kisch*, L. R., 2 H. L. 99. A subscriber

of the memorandum of association is liable for the shares for which he subscribed, although induced to do so by fraud of a promoter. *Lurgan's (Ld.) case*, (1902) 1 Ch. 707.

Innocent, but material, misrepresentation is also a ground for repudiating shares. One way in which this may arise is, that the memorandum of association of the company, when formed, does not correspond with the prospectus by which the shareholder was induced to take shares, or, in other words, that the company is in name only, the same as that in which the defendant agreed to take shares. *Stewart's case*, L. R., 1 Ch. 574; *Webster's case*, L. R., 2 Eq. 741; *Downes v. Ship*, L. R., 3 H. L. 343; see further *Karberg's case*, (1892) 3 Ch. 1, C. A. The various cases in which rescission of the contract to take shares will be granted on the ground of misrepresentation were considered in *Lynde v. Anglo-Italian Hemp Spinning Co.*, (1896) 1 Ch. 178. But the shareholder must use reasonable diligence in making himself acquainted with the contents of the memorandum of association, and he must on discovering the variance repudiate the shares at the earliest possible time; he will otherwise be taken to have acquiesced in the variance. *Oakes v. Turquand*, L. R., 2 H. L. 325; *Lawrence's case*; *Kincaid's case*, L. R., 2 Ch. 412; *Wilkinson's case*, *Id.* 536; *Peel's case*, *Id.* 674; *Whitchouse's case*, L. R., 3 Eq. 790; *Tait's case*, *Id.* 795. So where the company was formed for working a mine, represented to the directors and believed by them to be a valuable mine in full operation, and it proved worthless, and had ceased to be worked before the prospectus issued, and the directors rescinded the contract for the mine and proceeded to purchase another, it was held that a shareholder, who had taken shares on the faith of the prospectus, was entitled to be relieved from his liability. *Reese River Co. v. Smith*, L. R., 4 H. L. 64; see also *New Brunswick & Canada Ry. Co. v. Muggenridge*, 4 Drew. 686; 30 L. J., Ch. 242. But, a mere exaggeration in the statements in the prospectus is not sufficient for this purpose; *Denton v. Macneil*, L. R., 2 Eq. 352; and, an innocent misrepresentation must, in order to constitute a defence to an action for calls, be "such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration." *Panama, &c. R. Mail Co. v. Kennedy*, L. R., 2 Q. B. 580, 587. And in this point it differs materially from a fraudulent misrepresentation. *Vide ante*, p. 614. See also *Jackson v. Turquand*, L. R., 4 H. L. 305.

As to defence of a fraudulent arrangement between the defendant and the company as to shares, see *Odessa Tramways Co. v. Mendel*, 8 Ch. D. 235.

When a shareholder had been induced to take shares, by a prospectus which was "deemed fraudulent," by reason of nondisclosure of contracts as required by the Cos. Act, 1867, s. 38, *vide ante*, p. 847, that section gave him an action for false misrepresentation against the promoters, &c., who issued it, only, and did not entitle him to have his name removed from the register. *Gover's case*, 1 Ch. D. 182; *Sullivan v. Mitcalfe*, 5 C. P. D. 455, 465, *per* Baggallay, L.J. It did not, therefore, afford a defence to an action for calls; nor does the Directors Liability Act, 1890, *ante*, p. 846. Nor it would seem does the Cos. Act, 1900, s. 10, *ante*, p. 847.

Infancy.] An infant, in whom shares in a joint stock or railway company have vested either by contract or purchase or devolution, becomes thereby the possessor of an interest analogous to an interest in a real estate, and he so continues until repudiation either during infancy, or within a reasonable time after he has come of age. *Lumsden's case*, L. R., 4 Ch. 31; see also cases therein cited. Hence a simple defence of infancy is insufficient

in an action for calls, unless it also show that the interest is divested by such repudiation. *N. W. Ry. Co. v. M'Michael*, 5 Exch. 114, 120; *Dublin & Wicklow Ry. Co. v. Black*, 8 Exch. 181; 22 L. J., Ex. 94. See further, *Ebbett's case*, L. R., 5 Ch. 302; *Mitchell's case*, L. R., 9 Eq. 363; *Baker's case*, L. R., 7 Ch. 115. In such an action, the evidence will depend on the allegation traversed by the plaintiff in his reply.

Limitations, Statute of.] By sects. 16, 75 (*ante*, p. 1104), liability to pay calls is in the nature of specialty, and the period of limitation is therefore 20 years; 3 & 4 W. 4, c. 42, s. 3, *ante*, p. 721; and see cases cited *ante*, p. 679.

Set-off.] A shareholder in a *limited* company, who is also a creditor of the company, is not, in the event of the company being wound up, entitled to set-off against calls made on him either the debt due to him or dividends that may thereafter be due to him in respect thereof. *Grissell's case*, L. R., 1 Ch. 528. See on this case *Ex pte. Mackenzie*, L. R., 7 Eq. 240, 245; *per* Ld. Romilly, M.R. See also *Sankey Brook Coal Co. v. Marsh*, L. R., 6 Ex. 185; and *Kent's case*, 39 Ch. D. 259, C. A. Even although the winding-up is voluntary. *In re Whitehouse & Co.*, 9 Ch. D. 595; see also *Black & Co.'s case*, L. R., 8 Ch. 254. The decision in *Brighton Arcade Co. v. Dowling*, L. R., 3 C. P. 184, *contra*, cannot now be relied on. See 2 Lindley on Company Law, 6th ed. 1033. Nor is this right of set-off given by the J. Act, 1875, s. 10, *ante*, p. 308. *In re Auriferous Properties Co.*, (1898) 1 Ch. 691. So, against calls made before the winding-up, debts then due from the company cannot be set-off. *Calisher's case*, L. R., 5 Eq. 214; *Barnett's case*, L. R., 19 Eq. 449.

In the case of an *unlimited* company, the power of allowing a set-off of debts is reserved to the court by sect. 101. So, where the liability of the directors or manager of a company, otherwise limited, is made unlimited under the Cos. Act, 1867, ss. 1, 5; see s. 6. This power is, however, confined to allowing a set-off of debts against calls made *before* a winding-up order. *Ex pte. Brunichite*, 48 L. J., Ch. 463, not following *Gibbs & West's case*, L. R., 10 Eq. 312. As to the right of set-off under the Joint Stock Companies Acts, 1856, 1857, 1858, see *Garnet & Mosley Gold Mining Co. v. Sutton*, 3 B. & S. 321; 32 L. J., Q. B. 47; *Barrett's case* (No. 2), 4 D. J. & S. 756; 34 L. J., Bky. 41.

As to set-off of calls to a claim against the company on debentures, see *Ex pte. Mackenzie*, L. R., 7 Eq. 240; *Christie v. Tuunton, &c. Co.*, (1893) 2 Ch. 175.

Action for refusing to register transfer of shares.] The transferor of shares may sue the company for neglecting to register his transfer. *Skinner v. City of London Marine Insur. Cor.*, 14 Q. B. D. 882, C. A. As to damages recoverable, *vide* S. C.; *Tomkinson v. Bulkis Consolidated Co.*, cited *post*, p. 1120. See further *Maynard v. Consol. Kent Collieries Co.*, cited *ante*, pp. 222, 1103.

Contracts.] The Cos. Act, 1862, contained no provision as to how companies formed under it were to enter into contracts; but by the Cos. Act, 1867 (30 & 31 V. c. 131), s. 37, contracts on behalf of any company under the Cos. Act, 1862, "may be made as follows, that is to say, (1.) Any contract which, if made between private persons, would be by law required to be in writing, and if made according to English law, to be under seal, may be made on behalf of the company in writing under the common seal of

the company, and such contract may be in the same manner varied or discharged; (2.) Any contract which, if made between private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the company in writing, signed by any person acting under the express or implied authority of the company, and such contract may in the same manner be varied or discharged; (3.) Any contract which, if made between private persons, would by law be valid, although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under the express or implied authority of the company, and such contract may in the same way be varied or discharged: And all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors and all other parties thereto, their heirs, executors, or administrators, as the case may be." This section is the same as 19 & 20 V. c. 47, s. 41, which applies to companies registered under that act, even since its repeal by the Cos. Act, 1862, *vide ante*, p. 1096. *Prince v. Prince*, L. R., 1 Eq. 490.

By the Cos. Act, 1862, ss. 8, 9, a limited company is to have the word "limited" as the last word in its name. By sect. 42, any director or officer of such a company, issuing invoices, &c., or accepting, &c., a bill of exchange, &c., without the name mentioned as above, is made personally liable on such negotiable instruments, unless they are paid by the company. See *Penrose v. Martyr*, E. B. & F. 498; 28 L. J., Q. B. 28, decided under 19 & 20 V. c. 47, s. 31.

By sect. 47, "a promissory note or bill of exchange shall be deemed to have been made, accepted or indorsed on behalf of any company under this act, if made, accepted or indorsed in the name of the company by any person acting under the authority of the company; or, if made, accepted or indorsed by, or on behalf, or on account of the company, by any person acting under the authority of the company."

Sect. 55 enables any company to execute deeds by power of attorney out of the United Kingdom; and the Cos. Seals Act, 1864 (27 & 28 V. c. 19), gives facilities for the execution abroad of deeds of the company, by a special seal.

The Cos. Act, 1862, does not confer on all companies incorporated under it the power of issuing negotiable instruments: such a power exists only where, upon a fair construction of the memorandum and articles of association, it appears that it was intended to be conferred. *In re Peruvian Rys. Co.*, L. R., 2 Ch. 617. Where the company has such power, and represent that they have exercised it, they cannot afterwards set up any informality in the execution of the power. *Ex pte. Overend, Gurney & Co.*, L. R., 4 Ch. 460. See also *In re County Assurance Co.*, L. R., 5 Ch. 288; and *Collie's Claim*, L. R., 12 Eq. 246.

A contract with A. to act as foreman of the works of a company, registered under the act, signed by two of the subscribers to the memorandum of association, no articles having been filed or other shares allotted, was, in the absence of evidence to the contrary, held to be evidence of a contract binding on the company. *Totterdell v. Fareham Blue Brick, &c. Co.*, L. R., 1 C. P. 674. As to what contracts a trading company could enter into without seal before the Cos. Act, 1867, *ante*, p. 1109, see *S. of Ireland Colliery Co. v. Waddle*, and other cases, *ante*, pp. 1092 *et seq.*

A minute of a contract entered in a book and signed by the chairman under sect. 67, *ante*, p. 1097, is sufficient to satisfy the Stat. of Frauds, s. 4. *Jones v. Victoria Graving Dock*, 2 Q. B. D. 314, C. A. Sect. 67 gives validity to such acts only as are done prior to the invalidity of the appointment of

the directors, &c., being known. *In re Bridport Old Brewery Co.*, L. R., 2 Ch. 191.

Where shareholders permit persons to be *de facto* in the office of directors, the company is, as against innocent third parties, bound by the acts of those persons. *Mahony v. Holyford Mining Co.*, L. R., 7 H. L. 869. See also *County of Gloucester Bank v. Rudry Merthyr, &c. Colliery Co.*, (1895) 1 Ch. 629, C. A. *Owen & Ashworth's claim*, (1901) 1 Ch. 115, C. A.; *Duck v. Tower Galvanizing Co.*, (1901) 2 K. B. 314. Persons dealing *bonâ fide* with a managing director are entitled to assume that he has all the powers which he purports to exercise, if they be such as by the constitution of the company he can have. *Biggerstaff v. Rowatt's Wharf*, (1896) 2 Ch. 93, C. A. A company, having power to enter into a contract for the purchase of goods, is bound by such contract, although the goods may not be intended to be used for the purposes of the company, and although the fact may be known to the person with whom the contract is entered into. *In re Contract Corporation*, L. R., 8 Eq. 14.

A contract entered into by the directors, which is *ultra vires* of the company, will not bind the company, even though ratified by every member of the company. *Riche v. Ashbury Ry. Carriage, &c. Co.*, L. R., 7 H. L. 653. The company can by an ordinary general meeting enter into a contract which, although within its objects, is *ultra vires* of the directors. *Grant v. United Kingdom Switchback Rys. Co.*, 40 Ch. D. 135, C. A.; *Irvine v. Union Bank of Australia*, 2 Ap. Ca. 366, J. C. As to what constitutes sufficient ratification of such a contract by the individual members of the company, see *Phosphate of Lime Co., v. Green*, L. R., 7 C. P. 43; and cases cited *post*, p. 1115. A company registered with limited liability cannot have power to purchase its own shares, for such power would be inconsistent with sects. 8, 12. *Trevor v. Whitworth*, 12 Ap. Ca. 409, D. P. *Semble secus*, where the liability is unlimited. *In re Borough, &c. Building Soc.*, (1893) 2 Ch. 242. Where the articles provide that, as soon as 3,000 shares are subscribed for and allotted, the members should be associated for the objects of the company, the company have no power to enter into a contract until the 3,000 shares have been allotted. *Pierce v. Jersey Waterworks Co.*, L. R., 5 Ex. 209.

The promoter P. could not at law sue a company, after its incorporation, for preliminary expenses incurred by him in the establishment of the company, even though the articles of association of the company provide that such expenses shall be defrayed by the company; for P. is not a party to the articles, and the company could not be liable by ratification, as it did not exist at the time the work was done. *Melhado v. Porto Alegre Ry. Co.*, L. R., 9 C. P. 503; following *Kelner v. Baxter*, L. R., 2 C. P. 174, cited *ante*, p. 563. See also *Pritchard's case*, L. R., 8 Ch. 956; *Eley v. Positive, &c. Assur. Co.*, 1 Ex. D. 20, 88, C. A.; *Browne v. La Trinidad*, 37 Ch. D. 1, C. A. So where a contract has been made between A. and P. on behalf of the intended company, the company when formed cannot ratify it, so as to be bound thereby to A. *N. Sydney, &c. Co. v. Higgins*, (1899) A. C. 263, J. C.; *In re Empress Engineering Co.*, 16 Ch. D. 125, C. A.; nor for work done by other persons on P.'s retainer. *In re Rotherham Alum, &c. Co.*, 25 Ch. D. 103, C. A.; *In re English, &c. Produce Co.*, (1906) 2 Ch. 434, C. A. And even although the company have adopted, and derived benefit from, the services of P., they will not be liable to pay him therefor; S. C.; *In re Hereford, &c. Engineering Co.*, 2 Ch. D. 621, 624. See further *In re Northumberland Avenue Hotel Co.*, 33 Ch. D. 16, C. A.; and *Howard v. Patent Ivory Manufacturing Co.*, 38 Ch. D. 156; *Bagot, &c. Tyre Co. v. Clipper, &c. Tyre Co.*, (1902) 1 Ch. 146, C. A.; and *Natal Land, &c. Co. v. Pauline Colliery, &c. Syndicate*, (1904) A. C., J. C. A company may by its directors bind itself by a contract with themselves as promoters if all material facts are disclosed.

Salomon v. Salomon & Co., (1897) A. C., 22 D. P.; *Lagunas Nitrate Co. v. Lagunas Syndicate*, (1899) 2 Ch. 392, C. A.

By the Cos. Act, 1900, s. 6, a company cannot commence business or exercise its borrowing powers until certain conditions have been fulfilled. *Id.* (1), of which the certificate of the registrar of Joint Stock Companies shall be conclusive evidence; *Id.* (2). Any contract made by a company before the date at which it is entitled to commence business shall be provisional only, and shall not be binding on the company until that date, and on that date it shall become binding." *Id.* (3). But this section does not apply to any company where there has been no invitation to the public to subscribe for its shares. *Id.* (7). In the cases in which it applies the company cannot be made liable in contract until it has become entitled to commence business. *Jenkins' Claim*, (1906) 2 Ch. 390.

The company may, in general meeting, authorize payments if they are made *bonâ fide*, within the scope of the company's business, and reasonably incidental to carrying on that business for the company's benefit, although they could not legally be enforced; *Henderson v. Bank of Australasia*, 40 Ch. D. 170; and so may the directors. *Tuunton v. Royal Insur. Co.*, 2 H. & M. 135; 33 L. J., Ch. 406. As to authority of a general manager to make a promissory note on behalf of the company, see *Simpson's claim*, 36 Ch. D. 532. The liability in our courts of a shareholder in respect of the contracts of the company cannot, in the absence of express authority by him to pledge his credit, be extended by the law of the foreign country in which it trades. *Risdon Iron, &c. Works v. Furness*, (1906) 1 K. B. 49, C. A.

By the Cos. Act, 1862, s. 43, the company is to "keep a register of all mortgages and charges specifically affecting property of the company," but the security is not invalidated by non-registration. *Wright v. Horton*, 12 Ap. Ca. 371 D. P. The Cos. Act, 1900, s. 14, requires the filing with the registrar of certain mortgages created by the company on or after Jan. 1st, 1901, within 21 days after their creation, otherwise they are void against the liquidator, and any creditor of the company, so far as regards any security on the company's property. See the section and cases thereon, cited, *post*, pp. 1215, 1216.

Set-off and counter-claim.] In an action by a company, in course of compulsory winding-up, for a debt, the defendant may under J. Act, 1875, s. 10, *ante*, p. 308, set up by way of counter-claim, a claim for unliquidated damages. *Mersey Steel and Iron Co. v. Naylor*, 9 Q. B. D. 648, C. A.; 9 Ap. Ca. 434, D. P. That section extends the Bankruptcy Rules with regard to mutual credits and dealings, to claims that are within the Cos. Act, 1862, s. 158. *Eberles Hotels, &c. Co. v. Jonas*, 18 Q. B. D. 459, C. A. But it only applies to claims on each side which result in pecuniary liabilities. S. C. Thus a debt due from the plaintiff company cannot be counter-claimed against a claim by it in an action of detinue. S. C. See *In re Mid-Kent Fruit Factory*, (1896) 1 Ch. 567. The rights of the parties are in general fixed at the time of the winding-up. *Ince Hall Rolling Mills Co. v. Douglas Forge*, 8 Q. B. D. 179. Thus, in an action by a company, for the price of unascertained goods, supplied by the company after, but in pursuance of a contract entered into before, the commencement of the winding-up, a debt due from the plaintiffs to the defendant prior to that event cannot be set-off. S. C. But where, in pursuance of a contract entered into before the commencement of the winding-up, a sum of money becomes payable by the company, after that event, it may be set-off against a debt due to the company before the winding-up. *Lee and Chapman's case*, 30 Ch. D. 216, C. A.; *Sovereign Life Assur. Co. v. Dodd*, (1892) 2 Q. B. 573, C. A. Notice of the existence of debentures of the company as a floating security on all its property, at the time a debt due to the company was contracted, does not prevent a set-off

against such debt. *Biggerstaff v. Rowatt's Wharf*, (1896) 2 Ch. 93, C. A. Sect. 10 applies to any company in liquidation; *Ex pte. Theys*, 25 Ch. D. 591, *per* Ld. Selborne, C.; until it is shown to be solvent.

Action for misrepresentation.] A shareholder cannot, so long as he retains his shares, maintain an action for damages against the company, for inducing him to take the shares, by fraudulent misrepresentations, his only remedy being the rescission of the contract; *Tennent v. City of Glasgow Bank*, 4 Ap. Ca. 615, D. P.; *Houldsworth v. Id.*, 5 Ap. Ca. 317, D. P.; and where, owing to the winding-up of the company, it was impossible for the shareholder to place himself and the company in the same position as they were in prior to his taking the shares he cannot repudiate his shares on the ground of fraud, whether the winding-up is compulsory; S. C.; *Oakes v. Turquand*, L. R., 2 H. L. 325; or under the supervision of the court; *Burgess's case*, 15 Ch. D. 507; or voluntary; *Stone v. City and County Bank*, 3 C. P. D. 282, C. A.; unless before that event he had repudiated his shares, and had taken active steps to be relieved from his liability; *Ross v. Estates Investment Co.*, L. R., 3 Ch. 682; or there was some agreement with the company, which dispensed with the necessity of proceedings being taken by the particular shareholder. *Pawle's case*, L. R., 4 Ch. 497; *McNeill's case*, L. R. 10 Eq. 503. See also *Ashley's case*, L. R., 9 Eq. 263, and *In re Scottish Petroleum Co.*, 23 Ch. D. 413, C. A., where the previous cases are collected and considered. A counter-claim for relief, in an action for calls, may be sufficient. *Whiteley's case*, (1900) 1 Ch. 365, C. A. The same principle applies where unpaid shares have been allotted to A. instead of fully paid-up shares as agreed with him by the company; A. cannot claim against the company for this breach of contract while he retains the shares, nor repudiate them after the winding-up. *In re Addlestone Linoleum Co.*, 37 Ch. D. 191, C. A.

Action by company against its directors.] "Directors of a company acting within their powers, and with reasonable care, and honestly in the interest of the company, are not personally liable for losses which the company may suffer by reason of their mistakes or errors in judgment." *Lagunas Nitrate Co. v. Lagunas Co.*, (1899) 2 Ch. 392, 422, *per* Lindley, M.R., following *Overend, Gurney & Co. v. Gibb*, L. R., 5 H. L. 480. As to the protection of the Statutes of Limitation in an action against directors for innocently misapplying the property of the company, *vide ante*, p. 680.

Service of notices.] By sect. 62, "any summons, notice, order or other document required to be served upon the company, may be served by leaving the same, or sending it through the post in a prepaid letter addressed to the company, at their registered office."

By sect. 63, "any document to be served by post on the company, shall be posted in such time as to admit of its being delivered in the due course of delivery within the period (if any) prescribed for the service thereof; and in proving service of such document it shall be sufficient to prove that such document was properly directed, and that it was put as a prepaid letter into the post office."

Where H. is secretary to two companies, as to when notice to him as secretary of one company is also notice as secretary of the other, see *Deep Sea Fishery Cos. claim, ante*, p. 381.

By sect. 64, "any summons, notice, order or proceeding requiring authentication by the company may be signed by any director, secretary, or other authorized officer of the company, and need not be under the common seal of the company, and the same may be in writing or in print, or partly in writing and partly in print."

By Sch. 1, Table A, *vide ante*, p. 1099, n., Cl. (110), "a notice may be given by the company to any member, either personally or by sending it through the post in a prepaid letter, addressed to such member at his registered address or (if he has no registered address in the United Kingdom) at the address, if any, within the United Kingdom supplied by him to the company for the giving of notices to him." Cl. (111) regulates the giving of notices to other members; Cl. (112), to the first named joint holder; and Cl. (113), in the case of the death or bankruptcy of a member; and by Cl. (115), "any notice if given by post, shall be deemed to have been served at the time when the letter containing the same is put into the post-office; and in proving the giving of the notice it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post-office." These clauses only apply to notices within the ordinary business of the company, and not to the service of notice of facts, which would entitle the shareholder to repudiate his shares. *In re L. & Staffordshire Fire Insur. Co.*, 24 Ch. D. 149.

A third mode of service, by *leaving* the notice at the registered abode of the shareholder, is allowed by the 19 & 20 V. c. 47, Sch. Table B, Cl. (85); and Table A of the present act does not apply (see sect. 176) to companies formed and registered under the repealed Joint Stock Companies Acts; and as to those registered under the 19 & 20 V. c. 47, Table B of that act is still in operation (see sect. 205, *ante*, p. 1096).

Official liquidators.] Official liquidators, appointed under the act, have power, with the sanction of the court (sect. 95) amongst other things, to bring or defend any action, suit, or other legal proceeding, in the name and on behalf of the company. In the absence of fraud, *mala fides*, or personal misconduct, an action for damages will not lie against him pending the liquidation by a creditor or contributory, for delay in paying his debt or proportion of surplus assets. *Knowles v. Scott*, (1891) 1 Ch. 717. But after the dissolution of the company he is liable in damages to unpaid creditors if by reason of his negligence their debts have not been paid. *Pulsford v. Devenish*, (1903) 2 Ch. 625. As to the personal liability of an official liquidator for a rent-charge, see *Graham v. Edge*, 20 Q. B. D. 683, C. A., cited *ante*, p. 333.

3. Companies registered under the Joint Stock Companies Act, 1844 (7 & 8 V. c. 110).

This act is repealed (*ante*, p. 1084), but not as to the incorporation of companies registered, and liabilities incurred under it, and the following cases, &c., may still be useful. As to the effect on this act of the several enactments prior to the Companies Act, 1862, see *In re Bank of London, &c. Insurance Association*, L. R., 6 Ch. 421.

Companies, when completely registered under 7 & 8 V. c. 110, became only *quasi* incorporated for the purposes specified in the act. The deed of settlement must contain certain provisions in order to entitle the company to registration; but when a certificate of complete registration has been given by the registrar, the certificate is evidence that the needful provisions are inserted in the settlement, and the conditions fulfilled, which entitle the company to such certificate; sect. 7. In the absence of evidence to the contrary, the above certificate, and copies of the return made half-yearly to the registrar of all transfers of shares and changes in the shareholders, are admissible in evidence without proof of signature or seal of office; sect. 15; and certified copies or extracts of all returns and deeds registered shall be received without proof of signature or seal; sect. 18. The certificate of the registration of a joint-stock company, under the hand of the assistant registrar, is admissible in evidence, without any allegation in the certificate, or proof, *aliunde*, of the absence of

the registrar, although, by sect. 19, the assistant registrar is only empowered to act in the absence of his principal. *Baker v. Cave*, 1 H. & N. 674; 26 L. J., Ex. 190.

Actions for calls.] Sect. 55 provides for the recovery of calls. The company may sue, for the instalment due, in an action of debt; and in the statement of claim it is enough to state that, at the commencement of the suit, the defendant, as holder of — shares in the company, was indebted to the company in the sum of — for instalments of capital due and payable in respect of the shares, and that defendant has not paid it; and if on the trial it shall be proved that the defendant was holder of any share when the instalment became due, the company shall recover it, with interest at 5 per cent. from the day it became due.

On the trial the plaintiff must prove that the defendant is a shareholder. This may be by a certified copy of the registered list of subscribers; *Turner v. Metropolitan Live Stock Co.*, 2 Exch. 567; or of the returns of transfers made under sect. 18, cited *ante*, p. 1114; or by proof that he has received dividends, or otherwise acted as, or claimed to be, a shareholder, in which case the books of the company, duly kept, will be evidence against him of the number of shares. *Maguire's case*, 3 D. G. & Sm. 31.

In an action for calls the plaintiff may prove the registration of the company, if denied, without producing its certificate of registration. *Agricultural Cattle Insurance Co. v. Fitzgerald*, 16 Q. B. 432; 20 L. J., Q. B. 244. If in such an action the company's deed of settlement be produced in evidence to prove the defendant to be a shareholder, and therefore liable under sect. 55 of the act, the deed is available for this purpose, though it may appear that, since execution by the defendant, the name of a shareholder, subscribed before that of the defendant, has been erased, and the erasure not accounted for. S. C. It is no defence that the company's settlement deed did not comply with the conditions imposed by the act; the registrar's certificate is, for the purposes of such action, conclusive. *Banwen Iron Co. v. Barnett*, 8 C. B. 406; *Re Independent Assurance Co.*, 1 Sim. N. S. 47; 20 L. J., Ch. 30; *per Rolfe, V.-C.* As to the validity of an irregular transfer of shares, see *Murray v. Bush*, L. R., 6 H. L. 37.

An arrangement made with a shareholder for his retirement from the company, by the directors, beyond the scope of the deed of settlement, will become valid if ratified by every individual member of the company. *Evans v. Smallcombe*, L. R., 3 H. L., 249; see also *Spackman v. Evans*, *Id.* 171, and *Houldsworth v. Evans*, *Id.* 263. As to what constitutes sufficient ratification of such a contract, *vide* S. CC. As to what compromise is within the powers of the directors, *vide* S. CC., and *Dixon v. Evans*, L. R., 5 H. L. 606.

Contracts.] As to general contracts under sect. 44, although the statute or a deed of settlement may restrict the powers of the directors, it is not necessary for a plaintiff who sues the company, to show that the contract was conformable to the deed, or that the requirements in the statute were observed; the proof of irregularity lies on the defendants. *Smith v. Hull Glass Co.*, 8 C. B. 668; S. C., 11 C. B. 897; 21 L. J., C. P. 106. See *contra*, *Ridley v. Plymouth Grinding Co.*, 2 Exch. 711; but in the latter case the contract was foreign to the business of the company.

By sect. 45, bills of exchange and promissory notes (where authorized by deed of settlement or bye-law) shall be made or accepted by two directors expressly on behalf of the company, and countersigned by the secretary or other appointed officer; and indorsement may be in the name of the company by an authorized officer. On such a bill or note the company may sue or be

sued as effectively as in the case of a contract under their seal. Under this section, if a bill of exchange drawn upon a joint stock company be accepted by two of the directors, the acceptance is void as against the company, if not "expressed to be accepted" by them "on behalf of such company," though the section does not contain any words of nullification. *Halford v. Cameron's, &c. Ry. Co.*, 16 Q. B. 442; 20 L. J., Q. B. 160. But where a bill, drawn upon the company by their corporate name, and sealed with their seal, having the name of the company circumscribed, was accepted by two persons styling themselves directors of the company appointed to accept the bill, and the acceptance was countersigned by the company's secretary; held, that such acceptance was sufficiently express. S. C.; *Edwards v. Id.*, 6 Exch. 269. The want of the counter-signature, required by sect. 45, will be no defence to an action on the bill, the act being directory only, *semble*. *Aggs v. Nicholson*, 1 H. & N. 165; 25 L. J., Ex. 348.

By sect. 46, all deeds bearing the seal of the company shall be signed by two directors at least. Where the seal is apparently regular, and the instrument good on the face of it, no excess of authority on the part of the directors will be presumed; and, *semble*, if the excess be unknown to the obligee at the time, and if there be no fraud or irregularity, such excess of authority (at least in a matter within the general scope of the company's business) will be no defence. *R. British Bank v. Turquand*, 5 E. & B. 248; 24 L. J., Q. B. 327; 6 E. & B. 327; 25 L. J., Q. B. 317, Ex. Ch.; see *Agar v. Athenæum Insurance Co.*, 3 C. B., N. S. 725; 27 L. J., C. P. 95.

Whether and for what purposes a party contracting with a company is to be considered as affected with notice of the contents of the registered deed of settlement, was discussed in *R. British Bank v. Turquand*, *supra*, and the cases there cited, and in *Greenwood's case*, 3 D. M. & G. 459, 479; 23 L. J., Ch. 966, 973. In *Balfour v. Ernest*, 5 C. B., N. S. 601; 28 L. J., C. P. 170, it was treated as settled law that a person contracting with a registered company must be assumed to know, and, *semble*, is bound to learn what powers are conferred on the directors by the deed of settlement. But it is observable that the bill of exchange there sued on was, plainly and to the knowledge of the plaintiff, not one issued for the ordinary purposes of the company as such. See further *George Whitechurch v. Cavanagh*, (1902) A. C. 117, 131.

As to admissions by joint stock companies, see *ante*, pp. 69, 70.

4. *Companies within the Companies Clauses Consolidation Act, 1845, incorporated by special Acts.*

To what companies the act applies.] The Companies Clauses Consolidation Act, 1845 (8 & 9 V. c. 16), s. 1, enacts, "That this act shall apply to every joint stock company which shall, by any act which shall hereafter" (8th May, 1845) "be passed, be incorporated for the purpose of carrying on any undertaking: and this act shall be incorporated with such act; and all the clauses and provisions of this act, save so far as they shall be expressly varied or excepted by any such act, shall apply to the company which shall be incorporated by such act, and to the undertaking for carrying on which such company shall be incorporated, so far as the same shall be applicable thereto respectively; and such clauses and provisions, as well as the clauses and provisions of every other act which shall be incorporated with such act, shall, save as aforesaid, form part of such act, and be construed together therewith as forming one act." Sect. 3. The interpretation clause, amongst other things, enacts, that the word *month* shall mean calendar month: the expression *the directors* shall mean "the directors of the company, and shall include

all persons having the direction of the undertaking, whether under the name of directors, managers, committee of management, or under any other name: "the word *shareholder* shall mean "shareholder, proprietor, or member of the company; and in referring to any such shareholder, expressions properly applicable to a person shall be held to apply to a corporation;" and the expression *the secretary* shall include the word clerk.

The reported cases on this act are principally upon railway acts.

The Cos. Clauses Act, 1863 (26 & 27 V. c. 118), contains certain general clauses previously usually inserted in the special act, as to cancellation and surrender of shares, the creation of additional capital, debenture stock, and the change of name. This act has been amended by the Cos. Clauses Act, 1869 (32 & 33 V. c. 48).

Notice of action.] Some railway and other similar companies are entitled to notice of action under the act by which they are incorporated, for things done in pursuance of their act. It would seem that actions brought against them for acts done in the course of carrying on their business are not within 56 & 57 V. c. 61, *post*, p. 1131; see *A.-G. v. Margate Pier & Harbour Co.*, *post*, p. 1132, and hence such notice is still requisite. *Vide post*, pp. 1143 *et seq.* The absence of notice must be pleaded specially, and statutable power to show it under a general defence is not now usually given to such companies. The defence must show that the action falls within the class described in the statute. *Garton v. Gt. W. Ry. Co.*, E. B. & E. 846; 28 L. J., Q. B. 321, Ex. Ch. Where "*any person*" acting in pursuance of the act was entitled to notice of action, it was held that the company was included in the word *person*. *Boyd v. Croydon Ry. Co.*, 4 N. C. 669. By a railway act no action was to be brought for anything done or omitted to be done in pursuance of the act, or in the execution of the powers or authorities given by the act, unless 20 days' previous notice in writing should be given; the company, contrary to the provisions of the act, made excessive charges for the carriage of goods, and claimed and received the amount of such charges from the plaintiff; held, that in an action for money had and received, brought to recover back the sums so extorted, the company was entitled to a notice of action. *Kent v. Gt. W. Ry. Co.*, 3 C. B. 714. But in the case of a like provision, where an action was brought against a railway company, in its capacity of carrier, for an injury to the plaintiff whilst he was a passenger on the railway, it was held, that no notice of action was necessary, although for the purpose of showing that the accident occurred from a speed which was improper under the circumstances, evidence was given of the defective state of the rails, which it was contended was an omission in some of the works authorized by the act. *Carpue v. L. & Brighton Ry. Co.*, 5 Q. B. 747. And the same had been held, where the company's act had similar enactments, in an action against a railway company for not safely carrying some horses on the railway. *Palmer v. Gd. Junction Ry. Co.*, 4 M. & W. 749. This and the preceding case were decided on the ground that the companies were not under their acts compelled to be carriers but became such by voluntary election. *Lyles v. Southend-on-Sea Cor.*, (1905) 2 K. B. 1, 17 21, *per* Vaughan Williams and Stirling, L.JJ.

Where the notice is to be served under the Railway Clauses Consolidation Act, 1845 (8 & 9 V. c. 20), s. 138, which authorizes a notice to be left at or sent by post directed to the principal office, or one of the principal offices of the company, a subordinate office, however great the traffic at the station attached to it, is not a principal office, when there is another at which the central government of the railway is carried on, and where the secretary and principal officers are usually to be found. *Garton v. Gt. W. Ry. Co.*, E. B. & E. 837; 27 L. J., Q. B. 375. See also *Le Tailleur v. S. E. Ry. Co.*, 3

C. P. D. 18. This section is identical in terms with *Id.* c. 16, s. 135, cited *post*, p. 1127.

Defence of tender of amends in actions against railway companies.] By the Railways Clauses Consolidation Act, 1845 (8 & 9 V. c. 20), s. 139, "if any party shall have committed any irregularity, trespass, or other wrongful proceeding, in the execution of this or the special act, or any act incorporated therewith, or by virtue of any power or authority thereby given, and if before action brought in respect thereof such party make tender of sufficient amends to the party injured, such last-mentioned party shall not recover in any such action; and if no such tender shall have been made," the defendant may pay money into court.

Defence of lien for tolls.] This is given in certain cases to railway companies, by the 8 & 9 V. c. 20, s. 97, cited *ante*, p. 984.

Register of shareholders.] By 8 & 9 V. c. 16, s. 8, "Every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders hereinafter mentioned, shall be deemed a shareholder of the company."

Sect. 9. "The company shall keep a book to be called 'The Register of Shareholders'; and in such book shall be fairly and distinctly entered from time to time the names of the several corporations, and the names and additions of the several persons entitled to shares in the company, together with the number of shares to which such shareholders shall be respectively entitled, distinguishing each share by its number and the amount of the subscriptions paid on such shares; and the surnames or corporate names of the said shareholders shall be placed in alphabetical order, and such book shall be authenticated by the common seal of the company being affixed thereto, and such authentication shall take place at the first ordinary meeting, or at the next subsequent meeting of the company, and so from time to time at each ordinary meeting of the company."

By sect. 28, "The production of the register of shareholders shall be *prima facie* evidence of such defendant" (in an action for calls) "being a shareholder, and of the number and amount of his shares."

Evidence of title to shares.] By sect. 11, "On demand of the holder of any share, the company shall cause a certificate of the proprietorship of such share to be delivered to such shareholder, and such certificate shall have the common seal of the company affixed thereto; and such certificate shall specify the share in the undertaking to which such shareholder is entitled."

By sect. 12. "The said certificate shall be admitted in all courts as *prima facie* evidence of the title of such shareholder, his executors, administrators, successors, or assigns, to the share therein specified; nevertheless the want of such certificate shall not prevent the holder of any share from disposing thereof."

Sect. 13 provides for the issuing of a new certificate when the former one is worn out, damaged, lost, or destroyed.

Sects. 14, 15. The transfer of shares and stock is, "by deed duly stamped, in which the consideration shall be truly stated," registered at the company's office in a book called the "register of transfers"; and the company shall issue a new certificate to the transferee, or indorse a memorandum of the transfer on the old certificate, which memorandum has the same effect as a

new certificate. Till the transfer has been delivered to the secretary for registration, the transferor remains liable for calls.

Sects. 18 and 19 provide for the transmission of shares otherwise than by deed of transfer.

By sect. 20, "The company shall not be bound to see to the execution of any trust, whether express, implied, or constructive, to which any of the said shares may be subject."

It seems that the enactment in sect. 14, as to the stamp and consideration are merely directory, see *Powell v. L. & Provincial Bank*, (1893) 2 Ch. 555, 560, *per* Lindley, L.J. The execution of a transfer of shares does not pass the legal estate in them until registration under sect. 15. *Nanney v. Morgan*, 37 Ch. D. 346, C. A. See also *Roots v. Williamson*, *ante*, p. 1099. Nor does registration of an invalid transfer, *Powell v. L. & Provincial Bank*, *supra*. Executors are not registered under sect. 18 as such, but in their individual character. *Barton v. L. & N. W. Ry. Co.*, 24 Q. B. D. 77, C. A.

When the name of a shareholder has been inserted on the register in respect of shares, the company cannot remove his name or substitute that of another person, unless that person makes out a clear title paramount to the shares, or unless the entry was obtained by fraud or forgery; *Ward v. S. E. Ry. Co.*, 2 E. & E. 812; 29 L. J., Q. B. 177; and if the company remove his name, an action of mandamus will lie to compel it to replace it. S. C. Where a company removes the name of a shareholder, A., under a forged transfer deed of A.'s shares to B., the company must replace the shares in the name of A., unless he has been guilty of such negligence, as was the proximate cause of the transfer of the shares by the company. *Taylor v. Gt. Indian, Peninsula Ry. Co.*, 4 De G. & J. 574; 28 L. J., Ch. 709; *Ex pte. Swan*, 7 C. B., N. S. 429; 30 L. J., C. P. 113; *Swan v. N. British Australasian Co.*, 7 H. & N. 603; 31 L. J., Ex. 425; Ex. Ch. 2 H. & C. 175; 32 L. J., Ex. 273; *Johnston v. Renton*, L. R., 9 Eq. 181; see *Bank of Ireland v. Evan's Trustees*, 5 H. L. C. 389; and *Staple of England, Mayor, &c. of, v. Bank of England*, 21 Q. B. D., 160, C. A. So where A. and C. are joint holders of stock, and C. forges a transfer of the shares to D., and the company register it, and A. dies, his executor can compel the company to replace the stock. *Midland Ry. Co. v. Taylor*, 28 Beav. 287; 29 L. J., Ch. 731; 8 H. L. C. 751; 31 L. J., Ch. 336. See also *Barton v. N. Staffordshire Ry.*, 38 Ch. D. 458. In such case the Statute of Limitations runs only from the refusal of the company to replace the stock. S. C. One of two executors cannot make a valid transfer of stock registered in the names of both. S. C.; *Barton v. L. & N. W. Ry. Co.*, *supra*.

Where a company has registered shares in A.'s name under a forged transfer, and has issued to him a certificate in respect thereof, stating that the shares are standing in his name, the certificate will estop the company from setting up against B., a *bonâ fide* transferee, the infirmity of A.'s title; *In re Bahia & San Francisco Ry. Co.*, L. R., 3 Q. B. 584; and B. may sue the company for refusing to register him. *In re Ottos Kopje Diamond Mines*, (1893) 1 Ch. 618, C. A. The measure of damages is the value of the shares at the date of the refusal. S. C. A company is not, however, estopped by a forged certificate concocted and issued for his own ends by the secretary, such issue not being within the scope of his apparent authority. *Ruben v. Gt. Finquall Consolidated*, (1906) 2 K. B. 712, C. A.; (1906) A. C. 439, D. P. Where A., the transferee of shares, paid to the transferor B. the amount of a call made on the shares, on the faith of the registration by the company of the shares in A.'s name; it was held that the company were by their conduct estopped from disputing A.'s title to the shares. *Hart v. Frontino, &c. Gold Mining Co.*, L. R., 5 Ex. 111. So where on a transfer, for value, of shares from A. to B. being sent to the company for registration the

company issued a certificate in B.'s name, although the shares had without B.'s knowledge already been transferred by A. to C. and registered in his name, and B. sold the shares to D. on the faith of the certificate, it was held that the company were estopped from denying B.'s title. *Tomkinson v. Balkis Consolidated Co.*, (1891) 2 Q. B. 614, C. A.; (1893) A. C. 396. B. was held entitled to recover from the company as damages the price of other like shares bought by him to fulfil his contract with D. S. C. See further *Robinson v. Montgomeryshire Brewery Co.*, (1896) 2 Ch. 841. A certificate, though inaccurate, estops the company from denying its accuracy against any person relying on it, including, unless it be based on a forged transfer lodged by him, the person to whom it was issued, and that person, if put to rest by the certificate, so as to lose his remedy against his transferor, may recover damages against the company. *Dixon v. Kennaway & Co.*, (1900) 1 Ch. 833. As to onus of proof of such loss of remedy, *vide* S. C. But the mere registration of stock under a forged transfer to an innocent purchaser, B., creates no estoppel in favour of B., for B. acted on the faith of the transfer only, and not on any act of the company, and by sending the transfer to C. for registration, he induced C. to act thereon. *Simm v. Anglo-American Telegraph Co.*, 5 Q. B. D. 188, C. A. If the stock be transferred to I. as security for a loan to B., I. acquires a title good by estoppel, so long only as the loan is outstanding. S. C. See further *R. v. Shropshire Union Rys., &c. Co.*, L. R., 7 H. L. 496; *Burkinshaw v. Nicholls* and *Bloomenthal v. Ford*, cited *ante*, p. 1105.

Where a deed purporting to transfer shares from A. to B. and believed by B. to be genuine is sent by B. to the company C. for registration, B. impliedly undertakes to indemnify C. against loss occasioned to C. by the registration; thus where the transfer was forged and there had been no negligence on the part of B. or C., B. must bear the loss; *Sheffield Cor. v. Barclay*, (1905) A. C. 392, D. P., following *Starkey v. Bank of England*, (1903) A. C. 114, D. P., cited *ante*, p. 494. See *A.-G. v. Odell*, (1906) 2 Ch. 47, C. A.

The "certification" of a transfer by the placing thereon by the company's secretary of the words "certificates lodged" (*vide ante*, p. 574, n.), implies no warranty of the title of the transferor, L., or of the validity of the share certificates lodged, nor does it estop the company from disputing the validity of the transfer to L.; and, in the absence of fraud, no action will lie for an erroneous "certification." *Bishop v. Balkis Consolidated Co.*, 25 Q. B. D. 512, C. A. Nor is the company estopped from denying that the certificate had not been lodged with it, although its secretary fraudulently certified the transfer, for his authority is only to give a receipt for shares actually lodged. *George Whitechurch v. Cavanagh*, (1902) A. C. 117, D. P. This decision seems to overrule *McKay's case*, (1896) 2 Ch. 757. The owner B. of shares executed transfers of them for value to H., which were "certificated" and afterwards registered by the company; the company by mistake returned the certificates to B., who then pledged them with L., giving him also a transfer of the shares to L.; this the company refused to register by reason of the prior transfer to H.; it was held that L. had no remedy by estoppel against the company, as it had no duty after certification, except as regards H., and the return of the certificate to B. was not the proximate cause of L.'s loss. *Longman v. Bath Electric Trams*, (1905) 1 Ch. 646, C. A.

Where there are several claimants to shares registered in the name of a third person, the equitable title which is prior in time prevails, unless the claimant under a subsequent equitable title proves that, as between himself and the company he had acquired an absolute unconditional right to be registered as the owner of the shares, before the company received notice of the other claim. *Peat v. Clayton*, (1906) 1 Ch. 659, 664.

Shareholders liable to calls.] By sects. 21, 22, the directors have power to make calls upon the shareholders in respect of the capital for which they have subscribed; and 21 days' notice, at the least, is to be given of each call.

It seems that the entry of the name of a person on the register of the company is, under sect. 8, essential to constitute him a shareholder. *Newry and Enniskillen Ry. Co. v. Edmunds*, 2 Exch. 118. So neither the purchaser of scrip certificates for shares; *S. C.*; nor the subscriber to an undertaking; *Wolverhampton Waterworks Co. v. Hawkesford*, 6 C. B., N. S. 336; 28 L. J., C. P. 242; are liable to calls, when their names have not been inserted in the register. So, the allottee of scrip certificates "to bearer" is not liable to be placed on the register, if he do not accept shares in exchange for them. *McIlwraith v. Dublin Trunk Connecting Ry. Co.*, L. R., 7 Ch. 134. But the register need not be sealed in order to make the persons on it shareholders. *Wolverhampton Waterworks Co. v. Hawkesford*, 11 C. B., N. S. 456; 31 L. J., C. P. 184, Ex. Ch. Where a special act requires directors to hold a certain number of shares, they are, although their names are not on the register, liable by proceedings in *sci. fa.*, at any rate to the amount of that number of shares. *Porter v. Emmeus*, 1 C. P. D. 201, 664, C. A., explained in *Kipling v. Wood*, 3 C. P. D. 350, C. A. See further *In re S. London Fish Market Co.*, 35 Ch. D. 324, C. A.

It was held that a person to whom shares are allotted is not liable to pay calls, unless the shares allotted to him are specifically numbered and allotted to him by the number. *Irish Peat Co. v. Phillips*, 1 B. & S. 598; 30 L. J., Q. B. 114; on the authority of *Wolverhampton Waterworks Co. v. Hawkesford*, 7 C. B., N. S. 795; 29 L. J., C. P. 121. But the C. P. did not decide on this ground, but on the right ground that there was no register when the call was made; *per Ex. Ch.*; *Irish Peat Co. v. Phillips*, 1 B. & S. 638; 30 L. J., Q. B. 336; and the Ex. Ch. doubted the propriety of the decision of the Q. B., but affirmed the judgment on the ground that the defendant had not executed the deed of the company when the calls were made; the company being incorporated by charter. In *E. Gloucestershire Ry. Co. v. Bartholomew*, L. R., 3 Ex. 15, opinions were expressed by many of the judges that sect. 9 was merely directory; it was there held that the register need not, for the mere purpose of constituting a person a shareholder under sect. 8, comprise all the particulars required by sect. 9; and that even though it were necessary that the shares should be specifically appropriated to the person by their numbers, yet evidence that this had been done could be given *aliunde*, by showing that he signed the subscription contract. See also *L. Gd. Junction Ry. Co. v. Freeman*, 2 M. & Gr. 606, Ex. Ch., that the register will not be invalid by reason of omission in following strictly the requisitions of the statute; and see *post*, p. 1123. Where, however, the register is relied on under sect. 28 (*ante*, p. 1118), as *prima facie* evidence of the ownership of the shares, it must then strictly comply with the provisions of sect. 9; *E. Gloucestershire Railway Co. v. Bartholomew*, *supra*. Subscribers who, before the act is passed, agree to take shares, on being subsequently entered on the register of the company under sect. 8, are liable to pay calls; it is not necessary that the allotment of the shares should have been made within any particular time, or that notice thereof should have been given to the shareholder. *Burke v. Lechmere*, L. R., 6 Q. B. 297.

Where the special act provided that the company should not *issue* any shares created under the authority of the act, nor should any share *vest* in the person accepting the same until one-fifth of the share was paid up, it was held that *issue* referred to issuing of certificates, and *vest* to vesting of shares so as to be property and capable of transfer, but did not relieve

A., who had accepted shares, from liability to calls until one-fifth was paid on the shares. *E. Gloucestershire Ry. Co. v. Bartholomew*, L. R., 3 Ex. 15; *McEuen v. W. London Wharves, &c. Co.*, L. R., 6 Ch. 655. If, however, a transfer of the shares has been made by A. to B., and registered, A. is relieved from liability, by B. having entered into a substituted contract with the company to take shares. *Morton's case*, L. R., 16 Eq. 104.

Shares issued by a railway company to A. as fully paid up, and registered in his name as security for a loan, do not render A. liable to calls. *Guest v. Worcester, &c. Ry. Co.*, L. R., 4 C. P. 9. It is otherwise where a person, who has agreed to take fully paid up shares, makes no objection to the entry of his name on the register, as the holder of shares not paid up; he will be taken to have acquiesced in the alteration, and will be liable to calls. *Ilfracombe Ry. Co. v. Nash*, 18 W. R., 431, H. T. 1870. On an application for, and allotment of shares, the allottee remains liable after he has handed over the scrip certificates to a purchaser, unless the shares have been transferred by deed registered by the company. *McEuen v. W. London Wharves, &c. Co.*, *supra*. As to the allotment of scrip certificates to bearer, *vide ante*, p. 1121.

A shareholder who has transferred his shares is liable until the transfer has been registered: sect. 15, *ante*, p. 1118. *Midland Gt. W. Ry. Co. v. Gordon*, 16 M. & W. 807; *Sayles v. Blane*, 14 Q. B. 205. And after a call has been made, a shareholder cannot transfer until he has paid the call, nor until he has paid all calls for the time being due on every share held by him; sect. 16. And a call is made at the time when the resolution is passed, and not when the notice is given to the shareholder. *R. v. Londonderry, &c. Ry. Co.*, 13 Q. B. 993; and see *Orpen's case*, 32 L. J., Ch. 633 (on 7 & 8 V. c. 110, s. 54). But, this section only applies to a transfer of the shares on which a call can be and has been made, and the company must therefore register a transfer of stock, on which all the calls have been paid, although the transferor hold shares on which calls are due. *Hubbersty v. Manchester, &c. Ry. Co.*, L. R., 2 Q. B. 59; *Id.* 471, Ex. Ch. If the company register a transfer from A., from whom calls are due, the transfer is good, but A.'s liability for the past calls continues. *Ex pte. Littledale*, L. R., 9 Ch. 257.

Where the buyer of shares took a blank transfer of them, which he filled up in his name and procured to be registered; he was held to be estopped as against the company from setting up the invalidity of the transfer. *Sheffield, &c. Ry. Co. v. Woodcock*, 7 M. & W. 574, 582.

By sect. 21, "shareholder" shall extend to the legal personal representatives of such shareholder"; and it seems that executors are liable for calls due from their testator so long as they are in possession of the shares. *Birkenhead, &c. Ry. Co. v. Cotesworth*, 5 Exch. 226, 228; *Wills v. Murray*, 4 Exch. 843; but see *Ness v. Armstrong*, 4 Exch. 21, Ex. Ch.

An infant may be liable to calls, and the shares vest in him as in the nature of real estate, until he repudiates them, and this he may do within a reasonable time after full age. *Cork & Bandon Ry. Co. v. Cazenove*, 10 Q. B. 935; and the cases cited *ante*, pp. 1108, 1109.

As to when fraud or misrepresentation is a defence to an action for calls, *vide ante*, pp. 1107, 1108.

Actions for calls—proof necessary on the trial.] By 8 & 9 V. c. 16, s. 26, "In any action or suit to be brought by the company against any shareholder to recover any money due for any call, it shall not be necessary to set forth the special matter, but it shall be sufficient for the company to declare that the defendant is the holder of one share or more in the company (stating the number of shares), and is indebted to the company in

the sum of money to which the calls in arrear shall amount in respect of one call or more upon one share or more (stating the number and amount of each of such calls), whereby an action hath accrued to the company by virtue of this and the special act."

By sect. 27, "On the trial or hearing of such action or suit it shall be sufficient to prove that the defendant, at the time of making such call, was a holder of one share or more in the undertaking, and that such call was in fact made, and such notice thereof given as is directed by this or the special act; and it shall not be necessary to prove the appointment of the directors who made such call, nor any other matter whatsoever; and thereupon the company shall be entitled to recover what shall be due upon such call, with interest thereon, unless it shall appear either that any such call exceeds the prescribed amount, or that due notice of such call was not given, or that the prescribed interval between two successive calls had not elapsed, or that calls amounting to more than the sum prescribed for the total amount of calls in one year had been made within that period."

Proof of being a shareholder.] As to who are shareholders liable to calls, see *ante*, p. 1121.

The allegation in the statement of claim "that the defendant is the holder of shares," means that he was the holder at the time the call was made. *Belfast, &c. Ry. Co. v. Strange*, 1 Exch. 739. The statutory form is, therefore, not applicable in an action for calls against an executor, where the calls were made in the lifetime of the testator. *Birkenhead, &c. Ry. Co. v. Cotesworth*, p. 1122. But in such a case an amendment would probably be allowed at the trial.

By sect. 28 (*ante*, p. 1118) the production of the register of shareholders is made *prima facie* evidence of the defendant being a shareholder and of the number and amount of his shares; but this may be rebutted. *Waterford, &c. Ry. Co. v. Pidcock*, 8 Exch. 279; 22 L. J., Ex. 146. But where the defendant has by his own act induced the company to register him, he cannot then contradict the register. *Sheffield, &c. Ry. Co. v. Woodcock*, *ante*, p. 1122; *Cheltenham, &c. Ry. Co. v. Daniel*, 2 Q. B. 281. This section refers to the sealed register. *Birkenhead, Lancashire, &c. Ry. Co. v. Brownrigg*, 4 Exch. 426. The register must, of course, be proved to be, *de facto*, the register of the company, and be regular on the face of it; see sect. 9, *ante*, p. 1118, and cases thereon cited, *ante*, p. 1121; but it is evidence without proof that the seal was affixed to it at a general meeting of the company as required by sect. 9; *N. W. Ry. Co. v. M'Michael*, 5 Exch. 885; *R. v. Nash*, 2 Den. C. C. 493; 21 L. J., M. C. 147. The provisions of the act (sect. 9) as to keeping the register must have been substantially complied with, in order to make the register evidence. *Bain v. Whitehaven & Furness Junction Ry. Co.*, 3 H. L. C. 1. But irregularities or omissions will not render it inadmissible. *Southampton Dock Co. v. Richards*, 1 M. & G. 448; *L. Gd. Junction Ry. Co. v. Freeman*, 2 M. & Gr. 606; *Wolverhampton Waterworks Co. v. Hawkesford*, 7 C. B., N. S. 795; 29 L. J., C. P. 121; in Ex. Ch., 11 C. B., N. S. 456; 31 L. J., C. P. 184. A register book consisted of several large volumes, the last only of which, containing a recapitulation of the previous volumes, was authenticated by the seal of the company; it was held that this was sufficient, and the volumes were properly received in evidence. *Inglis v. Gt. N. Ry. Co.*, 1 Macq. 112.

As to the admissibility of examined or certified copies of the register, *vide ante*, pp. 97, 98, 101.

Proof of the call.] By 8 & 9 V. c. 16, s. 98, the directors are to cause notes, minutes, or copies of all their appointments and contracts, orders, and

proceedings of meetings, to be entered in books, and every such entry is to be signed by the chairman of such meeting; and the entry so signed shall be received as evidence in all courts, without proof of the meeting having been duly convened or held, or of the persons making or entering the orders, &c., being shareholders, directors or members of the committee; or of the signature of the chairman, or of the fact of his being chairman; all which matters shall be presumed, until proof to the contrary.

The resolution for a call, made at a meeting of directors, may be proved by production of the above book. It has been held, under like clauses in other acts, that a signature at a subsequent meeting by the same chairman is sufficient. *Southampton Dock Co. v. Richards*, ante, p. 1123; *W. London Ry. Co. v. Bernard*, 3 Q. B. 873. The minutes of an adjourned meeting, signed by the chairman, make the original minutes admissible in evidence, though they were not signed. *Inglis v. Gt. N. Ry. Co.*, ante, p. 1123. See also *Sheffield and Manchester Ry. Co. v. Woodcock*, 7 M. & W. 574. It must, however, be observed that where an act makes the entries in a company's books "originals," and "allowed to be read in all courts," it does not follow that they are admissible against all persons and for all purposes. See *Clarke v. Imperial Gas Co.*, 4 B. & Ad. 315.

Validity of call.] By sect. 99, acts done by directors are valid, notwithstanding their defective appointment or disqualification.

The special act usually limits the number and amount of calls, and of the aggregate amount of them within any one year, and the interval between each. Any deviation from the act, in these respects, will invalidate the call (sect. 22), and is a defence under sect. 27. The call is to be considered as made at the time the resolution was passed, and not when the notice of call was given to the shareholder. *R. v. Londonderry & Coleraine Ry. Co.*, 13 Q. B. 998. The resolution need not specify the time and place of payment; *Newry, &c. Ry. Co. v. Edmunds*, 2 Exch. 118; nor the person to whom payment is to be made; *Gt. N. of England Ry. Co. v. Biddulph*, 7 M. & W. 243; *L. & Brighton Ry. Co. v. Fairclough*, 2 M. & Gr. 674; provided a time, place, and person be appointed by the directors, and 21 days' notice given. S. CC. A call made payable by instalments is valid; *Ambergate, &c. Ry. Co. v. Norcliffe*, 6 Exch. 629; 20 L. J., Ex. 234, Ex. Ch.; but it was held that such a call could not be sued for in the statutory form until all the instalments had fallen due. *Ambergate, &c. Ry. Co. v. Coulthard*, 5 Exch. 459.

Proof of notice of call.] By 8 & 9 V. c. 16, s. 22, there must be at least 21 days' notice of each call. The notice, if under this act alone, must, it seems, be a special notice to each shareholder; but under the special acts of each company, a general notice by newspaper or otherwise is commonly made sufficient; *per Parke, B.*, in *Newry, &c. Ry. Co. v. Edmunds*, 2 Exch. 122. Notice of a call issued by the secretary, and purporting to be in pursuance of a resolution of the directors, will be presumed to be issued by authority. *Gt. N. of England Ry. Co. v. Biddulph*, *L. & Brighton Ry. Co. v. Fairclough*, *supra*.

Notices by post are in general sufficient; sect. 136, *post*, p. 1127. To prove the notice, plaintiffs proved that it was the duty of C., since deceased, to fill up and direct notices; that he had been seen preparing them according to a list of subscribers in his hands, made out from an address-book, and had put them in a basket; that all in the basket had been posted; and that a list in his handwriting had been found, containing the defendant's name and indorsed "letters sent out:" held, that the list might be presumed to be contemporaneous with the preparation of the notices, and that there was

evidence of a notice to the defendant. *E. Union Ry. Co. v. Symonds*, 5 Exch. 237; see also the cases cited *ante*, pp. 59, 385.

In the case of joint holders of shares, notice to the one first on the register is sufficient; sect. 137.

Interest.] By sect. 23, "If, before or on the day appointed for payment, any shareholder do not pay the amount of any call to which he is liable, then such shareholder shall be liable to pay interest for the same, at the rate allowed by law, from the day appointed for the payment thereof to the time of the actual payment."

Where the statutory form of claim is adopted, interest is recoverable thereunder without a separate claim, provided the claim at the end of the statement of claim is sufficient to cover such interest. *Southampton Dock Co. v. Richards*, 1 M. & Gr. 448; *L. & Brighton Ry. Co. v. Fairclough*, 2 M. & Gr. 674.

Defence to actions for calls.] The defendant may show that though registered he is not *de jure* a shareholder, because the shares were illegally created by the company. *Shropshire Union Ry. Co. v. Anderson*, 3 Exch. 401. Or, that there was no notice. *Edinburgh, &c. Ry. Co. v. Hebblewhite*, 6 M. & W. 707; *S. E. Ry. Co. v. Hebblewhite*, *infra*. Or, that calls were not properly made; *L. & Brighton Ry. Co. v. Wilson*, 6 N. C. 135; *S. E. Ry. Co. v. Hebblewhite*, 12 Ad. & E. 497; or that the shares had been forfeited before the call; *L. & Brighton Ry. Co. v. Fairclough*, 6 N. C. 270; or, had been transferred and the transfer registered before the call was made. *Aylesbury Ry. Co. v. Mount*, 4 M. & Gr. 651; 7 M. & Gr. 898.

Infancy (when it is a defence) must be specially pleaded. *Birkenhead, &c. Ry. Co. v. Pilcher*, 5 Exch. 24; as to the defence, *vide ante*, p. 1108.

It is no defence that the defendant became a shareholder and was registered with his assent, in consideration of an agreement to give him certain debentures, which could not legally be given by the company; for this is not an inquiry open after actual registration with defendant's consent. *W. Cornwall Ry. Co. v. Mowatt*, 15 Q. B. 521; 19 L. J., Q. B. 478.

If a forfeiture of shares has been declared, and confirmed under 8 & 9 V. c. 16, ss. 29 *et seq.*, this is a correlative remedy, and no answer to an action for the calls in arrear before the forfeiture. *Gt. N. Ry. Co. v. Kennedy*, 4 Exch. 417. But where the declaration of forfeiture is under a special act, which gives the remedy as an *alternative* one with that of an action for calls, then it is a defence. *Giles v. Hutt*, 3 Exch. 18. A mere declaration of forfeiture, without a subsequent confirmation at a general meeting, will not relieve the shareholder from future calls under any of the railway acts, special or general, *L. & Brighton Ry. Co. v. Fairclough*, 2 M. & Gr. 674.

As to surrender of shares, see *Kipling v. Todd*, 3 C. P. D. 350, C. A.

The action for calls is founded on specialty, and the period of limitation is under 3 & 4 W. 4, c. 42, s. 3 (*ante*, p. 721), 20 years. *Cork & Bandon Ry. Co. v. Goode*, 13 C. B. 826; 22 L. J., C. P. 198.

Action by shareholder for dividends.] A shareholder may sue the company for dividends that have been declared in respect of his shares, and have become payable, and it is no answer to the action that the company have wrongfully removed the plaintiff's name from the register. *Dalton v. Midland Counties Ry. Co.*, 13 C. B. 474; 22 L. J., C. P. 177. As to the Statute of Limitations applying to such action, *vide ante*, p. 722.

Proof of contracts.] By 8 & 9 V. c. 16, s. 97, the power of directors or their committees to make contracts on behalf of the company "may lawfully

be exercised " as follows:—1. Any contract which, if made between private persons, is required to be in writing and under seal, may be made, varied, or discharged by such directors or committee in writing and under the common seal. 2. Any contract which, if made between private persons, is required to be in writing signed by the parties to be charged, may be made, varied, or discharged by writing signed by two directors, or by two of the committee. 3. A contract which, if made between private persons, may be by parol and without writing, may be made, varied, or discharged by the directors or such committee by parol only, without writing.

By sect. 98, the directors are to cause entries of their contracts to be made in a book, which are to be signed by the chairman, and they then become admissible in evidence. See the section and cases decided thereon, *ante*, p. 1123.

Where a railway company occupied land, and no contract was proved, it was held that a parol contract with the directors, under sect. 97, would be presumed. *Lowe v. L. & N. W. Ry. Co.*, 18 Q. B. 632; 21 L. J., Q. B. 361. In such a case, even a common law corporation would be liable. *Semble*, S. C., and *vide ante*, p. 1093. But where the directors contracted under seal for certain works, the company was held not liable for work extra the contract, there being nothing from which a parol contract within sects. 97, 98, could be inferred. *Homersham v. Wolverhampton Waterworks Co.*, 6 Exch. 137; 20 L. J., Ex. 193. See *ante*, pp. 582, 1093. Where a clerk of the company ordered goods for the company, which they received and used in the construction of the railway, it was held that this was evidence of a parol contract under the act, and the court affirmed the ruling in *Lowe v. L. & N. W. Ry. Co.*, *supra*; *Pauling v. Id.*, 8 Exch. 867; 23 L. J., Ex. 105. See also *S. of Ireland Colliery Co. v. Waddle*, cited *ante*, p. 1092, in which case the earlier cases are reviewed.

Directors, exercising the powers conferred on them by the above section, must act together and as a board; if the consent of the statutory quorum of directors to the affixing of the seal of the company, be obtained by the secretary from each of them individually, in the absence of the others, the deed will not bind the company; *D'Arcy v. Tamar, &c. Ry. Co.*, L. R., 2 Ex. 158; see also *Ex pte. Kennedy*, 44 Ch. D. 472, 481, *per* Stirling, J.; except as against persons who have no notice of the irregularity; *Collie's Claim*, L. R., 12 Eq. 246. See also cases cited, *ante*, p. 1111, and 1 Lindley on Company Law, 6th ed., 208, 209.

If a contract be entered into by a director with the company, after his election, the contract is not rendered void by sects. 85, 86, but his office of director is vacated. *Foster v. Oxford, Worcester, &c. Ry. Co.*, 13 C. B. 200; 22 L. J., C. P. 99. It is no answer to an action by a secretary for his salary, that no determination as to such salary had ever been exercised at any general meeting of the company, as sect. 91 requires. *Bill v. Darent Valley Ry. Co.*, 1 H. & N. 305; 26 L. J. Ex. 81. The directors may, under sect. 90, make payments which could not be legally enforced, if they are made *bonâ fide* within the scope of the company's business, and are reasonably incidental to carrying on that business for the company's benefit. *Hutton v. W. Cork Ry. Co.*, 23 Ch. D. 654, 665, 672, *per* Cotton and Bowen, L.J.J. See *Henderson v. Bank of Australasia*, 40 Ch. D. 170. If, however, the payment is beyond the scope of the company's business it is illegal, although authorized by a general meeting. *Tomkinson v. S. E. Ry. Co.*, 35 Ch. D. 675.

The statute of limitation in an action against a company, under 8 & 9 V. c. 16, s. 65, for the costs of obtaining the special act, &c., runs only from the time the company had assets. *In re Kensington Station Act*, L. R., 20 Eq. 197.

A railway company cannot draw, accept, or indorse bills. *Bateman v.*

Mid Wales Ry. Co., L. R. 1 C. P. 499. As to contracts entered into by a railway company being void as *ultra vires*, see *E. Anglian Ry. Co. v. E. Counties Ry. Co.*, 11 C. B. 775; 21 L. J., C. P. 93; *Maegregor v. Deal & Dover, &c. Ry. Co.*, 18 Q. B. 618; 22 L. J., Q. B. 69, Ex. Ch.; *Taylor v. Chichester, &c. Ry. Co.*, L. R., 4 H. L. 628, cited *ante*, p. 666; *Shrewsbury, &c. v. N. Staffordshire Ry. Co.*, L. R., 1 Eq. 593; *Wilson v. Furness Ry. Co.*, L. R., 9 Eq. 28; and *Att.-Gen. v. Gt. E. Ry. Co.*, 5 Ap. Ca. 473. See also *Wenlock, Ly. v. River Dee Co.*, 10 Ap. Ca. 354, D. P.; *Munn v. Edinburgh N. Tramways Co.*, (1893) A. C. 69, D. P.

Sects. 38 *et seq.*, and the Railway Companies Act, 1867 (30 & 31 V. c. 127), ss. 23 *et seq.*, regulate the issuing debentures by railway companies; and by 7 & 8 V. c. 85, s. 19, the issuing of loan notes is rendered illegal; *Chambers v. Manchester & Milford Ry. Co.*, 5 B. & S. 588; 33 L. J., Q. B. 268; but they are valid so far as the company has had the benefit of the money for which the instrument was given. *In re Cork and Foughal Ry. Co.*, L. R., 4 Ch. 748; see also *Blackburn Building Soc. v. Cunliffe Brooks & Co.*, 22 Ch. D. 61, C. A.; 9 Ap. Ca. 857, D. P.; *Id. v. Id.*, 29 Ch. D. 902, C. A.; *Wenlock, Ly. v. River Dee Co.*, 19 Q. B. D. 155, C. A.; and *In re Wrexham, Mold, &c. Ry. Co.*, (1899) 1 Ch. 440, C. A. An overdrawn banking account is not an illegal loan. *Waterlow v. Sharp*, L. R., 8 Eq. 501. See, however, *Looker v. Wrightly*, 9 Q. B. D. 397, 403.

Where a company have issued debentures which are assignable and purport to have been issued under statutory authority, they are as against an innocent assignee for value, estopped from alleging that the debentures were issued illegally. *Webb v. Herne Bay Commissioners*, L. R., 5 Q. B. 642; *In re Romford Canal Co.*, 24 Ch. D. 85. But this estoppel does not bind the holders of other debentures, with which these debentures rank *pari passu*. *Mowatt v. Castle Steel, &c. Co.*, 34 Ch. D. 58, C. A.

See in general, as to contracts by corporations, *ante*, pp. 1091 *et seq.*

As to admissions by corporations or their agents, see *ante*, pp. 69, 70.

[*Service of notices.*] Notices may be served on the company by being left at, or sent by post to, the principal office or one of such offices, or by being given personally to the secretary, or (if none) to any director; 8 & 9 V. c. 16, s. 135. See *Garton v. Gt. W. Ry. Co.*, cited *ante*, p. 1117.

Service of notice by the company on shareholders, where not required to be personal, may be sent by post to the registered or other known address of the shareholder, so as to admit of delivery in due course within the prescribed time; and proof of posting and proper direction is enough. *Id.* s. 136; see *ante*, p. 1124.

In the case of joint holders of shares, notice to the one first on the register is sufficient. *Id.* s. 137.

A summons or notice or other such document requiring authentication by the company may be signed by two directors, the treasurer, or secretary, and need not be under seal, and may be written or printed, or partly in writing and partly in print. *Id.* s. 139.

5. *Banking Companies under 7 G. 4, c. 46; and Companies suing and sued by Public Officers.*

Power to sue by an officer of a company cannot be given by special constitution or resolution of a common law company. *Hylbart v. Parker*, 4 C. B., N. S. 209; 27 L. J., C. P. 120; *Gray v. Pearson*, L. R., 5 C. P. 568.

Certain banking and other companies may, by virtue of different statutes, sue and be sued in the name of one of their public officers, &c. By the Stamp Duties Act, 1869 (32 & 33 V. c. 19), s. 13, mining associations, conducted on the

cost-book principle, may sue their members for calls in the name of the pursuer of the mine as nominal plaintiff. The act also otherwise regulates these associations. The 7 G. 4, c. 46, s. 9, enabled certain banking copartnerships to sue and be sued in this manner, and this act is still in force, so far as regards banks already registered under it. These copartnerships are still regulated by this act and their deed of settlement, provided they have not been registered under any subsequent act. Those formed under 7 & 8 V. c. 113, were required by 20 & 21 V. c. 49, s. 4, to be registered under that act, and hence they now fall within certain provisions of the Companies Act, 1862; *vide ante*, p. 1096; but their right to sue and be sued in the name of their public officer is reserved to them; *vide infra*. See also 7 W. 4 & 1 V. c. 73, *post*, pp. 1129, 1130. Most of the cases decided on this subject have arisen under the stat. 7 G. 4, c. 46, but many of them will apply to other statutes containing similar provisions. Many banking companies formed under that act, have registered themselves under the Companies Act, 1862, s. 180, and when so registered the companies become incorporated, and sue in their own names and not by a public officer, *vide ante*, p. 1096.

By the Banking Companies Act, 7 G. 4, c. 46, s. 9, copartnerships carried on under that act may sue and be sued in the name of their public officers; and the death, resignation, removal, or any act of such public officer shall not abate or prejudice any such action or other proceeding commenced against, or by or on behalf of such copartnership; but the same may be continued, prosecuted, and carried on in the name of any other of the public officers of such copartnership for the time being. And by 7 & 8 V. c. 113, s. 47 (re-enacted by the Cos. Act, 1862, s. 205, and Sch. 3), this privilege is extended to other banking companies of more than six persons, within 65 miles from London, established on May 6th, 1844.

By a deed constituting a banking company, trading under the 7 G. 4, c. 46, if any public officer become bankrupt, his office was to become vacant: it was held that this meant that his office was to be void at the election of the company; but if, after the bankruptcy, it treated and held him out to the world as its public officer, it might sue and be sued in his name. *Steward v. Dunn*, 12 M. & W. 655.

Companies formed under the 7 G. 4, c. 46, are *quasi* corporations, and not ordinary partnerships: and notice to any one shareholder is not notice to the company, so as to affect the whole body. *Powles v. Page*, 3 C. B. 16; *Steward v. Dunn*, *supra*; *per Parke, B.* But the court in these cases seems to have relied on the effect of 1 & 2 V. c. 96, s. 1, which specially provides that suits between members and public officers of banking companies shall be conducted as if between strangers. The signature of an agent of the company to a false representation, is insufficient, under 9 G. 4, c. 14, s. 6 (*ante*, pp. 850, 851), to make the company liable thereon. *Swift v. Jewsbury*, L. R., 9 Q. B. 301, Ex. Ch.

The liability to pay calls arises under the deed of settlement, and is therefore a specialty debt: *vide ante*, p. 679.

The Act 7 G. 4, c. 46, renders it obligatory upon a banking company, in cases within it, to sue in the name of its public officer. *Chapman v. Milvain*, 5 Exch. 61. So, the creditors of such a company cannot sue an individual member of the company for a debt of the company, but must proceed against its public officer; *Steward v. Greaves*, 10 M. & W. 711; and, even if the business have been relinquished and there be no officer, the creditors cannot proceed against a member. *Davison v. Farmer*, 6 Exch. 242; 20 L. J., Ex. 177. But where a statute stated that *it shall be sufficient*, in all actions against the company, to state the name of the secretary, &c., as the nominal defendant, the court held, upon the construction of the whole statute, that it was not imperative to sue in this manner, but that a shareholder

might be sued. *Beech v. Eyre*, 5 M. & Gr. 415; *Blawitt v. Gordon*, 1 Dowl., N. S. 815. It seems that the 7 G. 4, c. 46, and the 1 & 2 V. c. 96, enable banking copartnerships to sue in the name of their public officer for the price of shares therein. *Davidson v. Bower*, 4 M. & Gr. 626.

If a statute enable a company to sue on covenants in which it is interested in the name of their secretary, an action may be brought in his name upon a covenant, made with third persons in which the company is interested. *Smith v. Goldsworthy*, 4 Q. B. 430; see *Skinner v. Lambert*, 4 M. & Gr. 477. And where an act provided that all actions to be instituted "by or on behalf of the company," might be brought in the name of the secretary, it was held that an action of covenant for calls might be brought in his name. *Wills v. Sutherland*, 4 Exch. 211. The public officer of a company, established under the 7 G. 4, c. 46, may, notwithstanding its change of name and the accession of new proprietors, maintain an action on a guarantee given to the company before its change of name. *Wilson v. Craven*, 8 M. & W. 584. Where such a copartnership had begun to carry on the trade and business of bankers, and issued notes accordingly, but subsequently stopped payment, and merely kept the establishment open for the purpose of paying its notes and winding up its affairs, it was held that it was still entitled to sue by its public officer. *Davidson v. Cooper*, 11 M. & W. 778; see *Lyon v. Haynes*, 5 M. & Gr. 504.

The delivery of a return to the Stamp Office, as required by the stat. 7 G. 4, c. 67, s. 4, is not a condition precedent to the company's right to sue in the name of the public officer. *Bonar v. Mitchell*, 5 Exch. 415; see *Wills v. Murray*, 4 Exch. 843.

Evidence Clauses.] By 7 G. 4, c. 46, ss. 4, 8, before banking copartnerships issue any notes or bills they must return to the Stamp Office the name of the firm, names and abodes of every member of it, the names and places of their banking houses, the names and description of their public officers, and names of the banking towns; and returns are also to be made from time to time of changes in the above particulars. By sect. 6, certified copies of the returns so filed, under the hand of a commissioner of stamps, are made receivable in evidence as proof of the appointment of the public officers, and that the persons named as members were such at the date of the return.

The above sect. 6 requires that the certificate shall be proved to be signed by the person making it, but not that he shall be proved to be a commissioner. Stat. 8 & 9 V. c. 113, s. 1 (*ante*, p. 100), apparently dispenses with proof of the signature.

In *Bosanquet v. Woodford*, 5 Q. B. 310, the certified copy was held evidence that defendant was a member at the time of the jurat of the return, though not made within the period limited by the act. See also *Powis v. Harding*, 1 C. B., N. S. 533; 26 L. J., C. P. 107; and *Preseott v. Buffery*, 1 C. B. 41. A certificate showing that the plaintiff was a public officer in Mar. 1841, was held presumptive proof that he continued to be so in Nov. 1842; the office not being annual. *Steward v. Dunn*, 12 M. & W. 655; which see further as to the affidavit under the 6th section. If the defendant were a shareholder in Mar. 1847, and the annual return show him to be one also in Mar. 1848, this is evidence on the issue that he was one in Jan. 1848. *Bosanquet v. Shortridge*, 4 Exch. 699; see also *ante*, p. 34.

6. Companies constituted by Charter or Letters Patent under stat.

7 W. 4 & 1 V. c. 73.

By the stat. 7 W. 4 & 1 V. c. 73, s. 2, the crown is empowered by letters patent to grant to a company or body of persons, without incorporating them,

any privileges which according to the rules of common law the crown could grant by a charter of incorporation.

By sect. 3, such letters patent may provide that the company so formed without incorporation may sue or be sued in the name of its public officer, &c.

By sect. 4, the liability of the individual members, for the liabilities of the company, may be limited to such extent *per share* as may be thereby declared.

Sect. 5 requires the execution of a deed of partnership, which must contain certain particulars.

Sections. 6-16 require certain returns to be made of the names of shareholders, &c. By sect. 17, all such returns are directed to be made to the enrolment office of the Court of Chancery in England and to be registered by the clerks of enrolment in Chancery, or their deputy; and any person may require a copy of any such return, to be certified by the said clerks or their deputy, and the day of the registration of every return, to be made in pursuance of this act, is to be written on such return by the said clerks or their deputy; and by sect. 18, a copy so certified of such return, including the date to be marked thereon, is to be received in evidence in all proceedings whether civil or criminal, and is also to be received as evidence of the day of the registering thereof.

By sect. 22, actions are not to abate or be prejudiced by the death or by any act of such officer, or by his resignation or removal, &c.

By sect. 26, "In all cases wherein it may be necessary for any person to serve any summons, demand or notice, or any writ or other proceeding at law or in equity, or otherwise, upon the said company or body, service thereof respectively on the clerk of the said company or body, or by leaving the same at the head office for the time being of the said company or body, or in case such clerk of the said office shall not be found or known, then service thereof on any agent or officer employed by the said company or body, or by leaving the same at the usual place of abode of such agent or officer, shall be deemed good and sufficient service of the same respectively on the said company or body."

By sect. 27, "In all cases wherein it may be necessary for the said company or body to give any summons, demand, or notice of any kind whatsoever to any person or corporation, under the provisions or directions contained in this act, such summons, demand or notice may be given in writing, signed by the clerk, attorney, or solicitor for the time being of the said company or body, without being required to be under the common seal of the said company or body."

By sect. 29, the crown is empowered in any charter of incorporation "to limit the duration thereof for any term or number of years, or for any other period whatsoever; and also in any charter of incorporation (whether in perpetuity or for any term or period), either by reference to this act or otherwise, to make the corporation thereby formed, and the officers and members thereof, subject to all of the provisions, liabilities, and directions hereinbefore authorized to be imposed on or required from any unincorporated company or body, or its officers or members, and also to confer on such corporation or its members and officers, all the powers or privileges hereinbefore authorized to be conferred on any unincorporated company or body, or its officers or members; and all the powers, provisions, clauses, matters, and things hereinbefore contained in reference to unincorporated companies or bodies, shall accordingly in such case, and so far as the same may be applicable, be considered to belong and apply to such corporation." As to the object of this section, *vide ante*, p. 1091. To remove doubts as to the power of the Crown to renew such charters, the stat. 47 & 48 V. c. 56, provides

that the above section shall be construed, as from the date thereof, to have authorized the Crown, by charter or warrant, or other writing under the sign manual, from time to time to extend or renew, conditionally or unconditionally, any period for which any charter or any privilege of such charter may be limited to endure.

It is believed that the power conferred by this act of constituting an unincorporated company which can sue by a public officer is now disused.

ACTIONS AGAINST CONSTABLES, JUSTICES AND PERSONS ACTING UNDER STATUTES OR PUBLIC DUTY.

There were formerly many provisions for the protection of persons acting in execution of statutory or other public duty. These provisions have, however, so far as they were contained in public general acts, been repealed by stat. 56 & 57 V. c. 61, the full title of which is, "An act to generalize and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties," s. 2, the short title being, by sect. 5, "The Public Authorities Protection Act, 1893," and a uniform protection is provided by sect. 1. The main changes thereby introduced are, the abolition of notice of action, of the right to plead the general issue, and of local venue; a uniform period of six months' limitation of action is fixed in every case, the defendant may tender amends, and there are special provisions as to the defendant's costs.

The provisions of the act are as follows:—Sect. 1. Where, after Jan. 1st, 1894, "any action, prosecution, or other proceeding is commenced in the United Kingdom against *any person*" (*vide post*, p. 1132) "for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect:—(a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof: (b) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client: (c) Where the proceeding is an action for damages, tender of amends before the action was commenced may, in lieu of, or in addition to any other plea, be pleaded. If the action was commenced after the tender, or is proceeded with after payment into court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he shall not recover any costs incurred after the tender or payment, and the defendant shall be entitled to costs, to be taxed as between solicitor and client, as from the time of the tender or payment; but this provision shall not affect costs on any injunction in the action: (d) If, in the opinion of the court, the plaintiff has not given the defendant a sufficient opportunity of tendering amends before the commencement of the proceeding the court may award to the defendant costs to be taxed as between solicitor and client. This section shall not affect any proceedings by any department of the Government against any local authority or officer of a local authority."

Sect. 2. "There shall be repealed as to the United Kingdom so much of any public general act as enacts that *in any proceeding to which this act*

applies—(a) the proceeding is to be commenced in any particular place; or (b) the proceeding is to be commenced within any particular time; or (c) notice of action is to be given; or (d) the defendant is to be entitled to any particular kind or amount of costs, or the plaintiff is to be deprived of costs in any specified event; or (e) the defendant may plead the general issue; and in particular there shall be so repealed the enactments specified in the schedule to this act to the extent in that schedule mentioned. . . .”

In this act “person” includes any body of persons corporate or incorporate; see 52 & 53 V. c. 63, s. 19.

Sect. 2 does not of course place any restriction on the provisions of statutes passed subsequently to Dec. 5th, 1893, the date the act passed. See *Boden v. Smith*, 18 L. J., C. P. 121, cited *post*, p. 1142.

The act applies to municipal corporations, which in pursuance of statutory authority provide a smallpox hospital; *Harrop v. Ossett (Mayor of)*, (1898) 1 Ch. 525; or a water supply; *Fielden (or Fielding) v. Morley Cor.*, (1899) 1 Ch. 1, C. A.; (1900) A. C. 133, D. P.; or electricity for lighting; *Jeremiah Ambler & Sons v. Bradford Cor.*, (1902) 2 Ch. 585, C. A.; or harbour accommodation; *The Ydun*, (1899) P. 236, C. A.; and to a metropolitan vestry acting as the sanitary authority; *Cree v. St. Pancras Vestry*, (1899) 1 Q. B. 693; and to a county council acting under the Local Government Act, 1894, s. 26; *Shaw v. Hertfordshire Cy. Council*, (1899) 2 Q. B. 282, C. A.; and to a person acting by their authority; *Greenwell v. Howell*, (1900) 1 Q. B. 535, C. A. So the Act applies to a County Council or municipal corporation working under statutory powers, a tramway; *Parker v. L. County Council*, (1904) 2 K. B. 501, or a light railway; *Lyles v. Southend-on-Sea Cor.*, (1905) 2 K. B. 1, C. A., provided they are bound to carry passengers. S. C., *Id.* 13–15, 21, *per* Vaughan Williams & Stirling, L. J. J. It was suggested, though expressly *not* decided, by the C. A. in *Fielden v. Morley Cor.*, *supra*, that the general words in sect. 1 must be limited by the *full* title (not the *short* title, as is reported to have been quoted and relied on by Jeune, P., in *The Ydun*, (1899) P. 236, 239), and the effect of the statute be confined to the protection of *public bodies*. See also *Jeremiah Ambler & Sons v. Bradford Cor.*, (1902) 2 Ch. 585, 594, *per* Romer, L. J., *Lyles v. Southend-on-Sea Cor.*, (1905) 2 K. B. 13 *per* Vaughan Williams, L. J. And in *A.-G. v. Margate Pier & Harbour Co.*, (1900) 1 Ch. 749, the act was held not to extend to that company, merely because it acted under powers given it by its statute of incorporation. It does not extend to a claim in respect of a private duty arising out of a contract between the plaintiff and the public body sued. *Sharpington v. Fulham Guardians*, (1904) 2 Ch. 449. See also *Lyles v. Southend-on-Sea Cor.*, (1905) 2 K. B. 14, *per* Vaughan Williams, L. J. Nor to protect an independent contractor who, for his own profit, contracts to do work which a public authority is authorized to do, and creates a nuisance in executing it. *T. Tilling v. Dick Kerr & Co.*, (1905) 1 K. B. 562, following *Kent County Council v. Folkestone Cor.*, *Id.* 620, C. A.

The act applies to an action for an injunction only, as well as to one for damages. *Fielding v. Morley Cor.*, *supra*. It is not restricted to actions of tort. *Cree v. St. Pancras Vestry*, *supra*. It does not, however, apply to an action of slander, for “words spoken” do not constitute “anything done.” *R. Aquarium, &c., Soc. v. Parkinson*, (1892) 1 Q. B. 431, C. A., decided under 11 & 12 V. c. 44, s. 8. As to when an act is done in pursuance or execution, &c., of the Act of Parliament, &c., within sect. 1, the decisions as to when notice of action was formerly required, will be found useful; they are collected *post*, pp. 1143 *et seq.* Sect. 1 (a) does not apply to actions *in rem*. *The Burns*, (1907) P. 137, C. A.

The statute is retroactive and applies to causes of action which arose before

it was passed. *The Ydun*, C. A., *ante*, p. 1132. It applies to actions brought under stat. 9 & 10 V. c. 93, *vide ante*, pp. 810, 811.

As to how the six months' limitation is to be calculated, *vide post*, p. 1141. Although where the cause of action is continuing the action must be commenced within 6 months from its ceasing, yet damages are recoverable which have accrued within 6 years before action. *Harrington, El. of v. Derby Cor.*, (1905) 1 Ch. 205. The statement of claim now always specifies the date of the issuing of the writ of summons by which the action was commenced, and, subject to amendment, is, it seems, conclusive as to that date. *Vide ante*, p. 677.

Where the defendant obtains judgment with costs, the costs must, under sect. 1 (*b, c*), be taxed as between solicitor and client, the court having no discretion in the matter; *Fiddlen v. Morley Cor.*, *ante*, p. 1132; even although the judgment is merely entered up "with costs to be taxed." *N. Metropolitan Tramways Co. v. L. County Council*, (1898) 2 Ch. 145. The court has, however, as in other cases, (*vide ante*, pp. 296 *et seq.*), a discretion to deprive the defendant altogether of costs, *Bostock v. Ramsay Urban Authority*, (1900) 2 Q. B. 616, C. A.; or it would seem, to allow him only party and party costs, (1900) 1 Q. B. 364, *per* Ld. Russell, C.J.

By the Merchant Shipping Act, 1894, s. 358, the above act for the purposes of the provisions of Part III. (other than the provisions relating to passenger steamers only) applies to the whole of H.M.'s dominions and wherever he has jurisdiction. As to the special protection granted to Inland Revenue officers, see 53 & 54 V. c. 21, s. 29 (2). As to the protection afforded by the Pacific Islanders Protection Act, 1872 (35 & 36 V. c. 19), s. 20, see *Burns v. Nowell*, 5 Q. B. D. 444, C. A.

1. *Actions against Constables.*

The provisions contained in public general statutes, passed before Jan. 1st, 1894, as to the defence to actions brought against constables for acts done by them in the execution or intended execution of their duty, have been repealed so far as they relate to local venue, limitation or notice of action, costs, or to pleading not guilty by statute, by 56 & 57 V. c. 61, s. 2, and in lieu thereof special defences are allowed by sect. 1, *ante*, p. 1131. As to what acts fall within that section *vide ante*, p. 1132, and *post*, p. 1141 *et seq.* But constables appointed under local acts are sometimes entitled to notice of action.

Notice of action.] As to the notice of action, *vide supra*. Where a local lighting act enabled the commissioners to appoint constables having a general jurisdiction, and required notice of action against a person doing anything in pursuance of the act: held that a constable so appointed had no protection beyond other constables, and that notice was not necessary in respect of anything which was not directly within the powers of the act. *Shatwell v. Hall*, 10 M. & W. 523.

Where notice is required, the decisions respecting notice of action, *post*, pp. 1143 *et seq.*, will be found useful.

Demand of copy of warrant.] By the Constables' Protection Act, 1750, 24 G. 2, c. 44, s. 6, no action shall be brought against any constable, headborough, or other officer, or against any person or persons acting by his order and in his aid, for anything done in obedience to any warrant under the hand or seal of any justice of the peace, until demand has been made or left at the usual place of his abode, by the party or parties intending to bring such action, or by his or their attorney or agent, in writing, signed by the party demanding the same, of

the perusal and copy of such warrant, and the same hath been refused or neglected for the space of six days after such demand; and in case after such demand and compliance therewith by showing the said warrant to, and permitting a copy to be taken thereof by the party demanding the same, any action shall be brought against such constable, &c., without making the justice who signed or sealed the said warrant defendant, on producing or proving such warrant at the trial of such action, the jury shall give their verdict for the defendant notwithstanding any defect of jurisdiction in such justice. And if such action be brought jointly against such justice and constable, &c., then on proof of such warrant the jury shall find for the constable, &c., notwithstanding such defect of jurisdiction.

This enactment extends only to actions of tort, and not to actions on contract (B. N. P. 24), of replevin (*Fletcher v. Wilkins*, 6 East, 283), or the like.

The stat. 51 & 52 V. c. 43, s. 54, contains a similar provision as to county court bailiffs. See also *Id.* s. 55.

[*What persons are within the stat. 24 G. 2, c. 44, s. 6.*] The Metropolitan Police, 10 G. 4, c. 44, s. 4; 2 & 3 V. c. 71, s. 55; special constables, 1 & 2 W. 4, c. 41, s. 5; county police, 2 & 3 V. c. 93, s. 8; 3 & 4 V. c. 88, s. 35, see also 19 & 20 V. c. 69, ss. 6, 31; parish constables, 5 & 6 V. c. 109, s. 15; and borough police, 45 & 46 V. c. 50, s. 191 (2), have the same privileges as constables.

Churchwardens and overseers of the poor taking a distress for poor's rates are entitled to the protection of the statute. B. N. P. 24; *Harper v. Carr*, 7 T. R. 271. So a gaoler who receives and detains a prisoner under the warrant of a magistrate. *Butt v. Newman*, Gow, 97; *Henderson v. Preston*, 21 Q. B. D. 362, C. A. So a prison officer acting as such, 61 & 62 V. c. 41, s. 10. See also the Inebriates Act, 1898; *Id.* c. 60, s. 11 (1).

This section is intended to protect the officer in those cases only where the justice remains liable, and it is necessary, in order to bring the officer within it, that he should act most strictly in obedience to his warrant. *Parton v. Williams*, 3 B. & A. 330, and *Id.* 333, per Abbott, C.J.; *Peppercorn v. Hofman*, 9 M. & W. 618. Therefore, when there is no remedy against the justice, no demand of a copy is necessary. *Cotton v. Kadwell*, 2 Nev. & M. 399; *Parton v. Williams*, *supra*. Thus, where an officer apprehends a different person from that described in the warrant, he is not protected; *Money v. Leach*, 3 Burr. 1742; although the person apprehended is the party against whom the warrant ought to have issued. *Hoye v. Bush*, 1 M. & Gr. 775. So, where a constable having a warrant, to search for cotton which had been stolen, took also a tin pan and sieve which were claimed by the person robbed, but were not mentioned in the warrant, nor likely to furnish evidence of the identity of the articles stolen. *Crozier v. Cundey*, 6 B. & C. 232. So, where in executing a warrant of distress, he enters a house in such a manner as to become a trespasser *ab initio*. *Bell v. Oakley*, 2 M. & S. 259; and see *R. v. Marsden*, L. R., 1 C. C. 121. The warrant must be executed by the constable to whom it is directed. *R. v. Sanders*, *Id.* 75. But, if in blank, it seems that it may be executed by the constable to whom it is delivered. *R. v. Weil*, 9 Q. B. D. 701, 707. The prevention of Crimes Act, 1871 (34 & 35 V. c. 112), s. 16, authorises a constable in certain cases, to search for and seize goods, under a warrant issued by a chief officer of police.

The officer is not deprived of the protection of the statute though the warrant is not shown to be legal, provided he acted in obedience to it. *Price v. Messenger*, 2 B. & P. 158. And, generally, a want of jurisdiction in the justices will not deprive the officer of the benefit of the statute. *Atkins v. Kilby*, 11 Ad. & E. 777. In an action against overseers for excessive distress

for a poor rate, no demand of the warrant is necessary. *Sturch v. Clarke*, 4 B. & Ad. 113. The act does not extend to a warrant granted by a judge of the Q. B. D. *Gladwell v. Blake*, 1 C. M. & R. 636.

Evidence of demand.] The demand may be proved by the production of a duplicate original, without a notice to produce; *Jory v. Orchard*, 2 B. & P. 39, and see *ante*, p. 8; and it is sufficient if the demand be signed by the plaintiff's solicitor, and left at the defendant's residence by the solicitor's clerk. S. C.; *Clark v. Woods*, *infra*. Where the statement of claim does not charge the defendants as officers, the plaintiff need not, in the first instance, prove a demand of a copy of the warrant. If the defendants mean to justify under the warrant, that proof lies upon them, and when they come to that part of the case the plaintiff must prove a demand. *Price v. Messenger*, 3 Esp. 96. Where the warrant was in the hands of the gaoler, and the agent of the plaintiff made no objection to the copy when tendered, it was held that the perusal of the original was dispensed with. *Atkins v. Kilby*, *ante*, p. 1134. The demand need not specify the time within which it should be complied with; therefore where a copy was required "within three days," the demand was held sufficient. *Collins v. Rose*, 5 M. & W. 194.

If the constable refuse or neglect, for the space of six days, to comply with the demand, the constable may be sued as before the statute, and the mere fact of the justice being joined as co-defendant, does not entitle the constable to an acquittal. *Clark v. Woods*, 2 Exch. 395. But, if he comply with the demand at any time before action brought, though more than six days after the demand, he will be within the protection of the act. *Jones v. Vaughan*, 5 East, 455. It is no excuse for non-compliance with the demand, that the plaintiff has already obtained a copy of the warrant from another person. *Clark v. Woods*, *supra*.

Evidence of arrest.] In actions against constables, it sometimes becomes a question whether the evidence is sufficient to establish an arrest; as to this evidence, *vide ante*, pp. 921, 922.

Defence.

The defendant can no longer raise any defence he may have by virtue of a public general Act passed prior to Dec. 5th, 1893, under the defence of not guilty by statute; the defence must be pleaded specially. 56 & 57 V. c. 61, s. 2 (c). Notice of action is no longer required by such public general statute, *Id.* s. 2 (c); nor is the venue local, *Id.* s. 2 (a). But special defences are given by *Id.* s. 1, *vide ante*, p. 1131. As to what acts fall within sect. 1, *vide ante*, pp. 1132, 1133.

The fact of the defendant being a constable or other public officer is sufficiently shown by proof that he was acting as such; and the regularity of his appointment will be then presumed. *Vide ante*, p. 43. A constable, having reasonable cause to suspect that a felony has been committed, is justified in arresting the party suspected, though it afterwards appear that no felony has been committed. *Beckwith v. Philby*, 6 B. & C. 635; *Davis v. Russell*, 5 Bing. 354. But, it is otherwise in a case of misdemeanor, without a warrant; *For v. Gaunt*, 3 B. & Ad. 798; *Bowditch v. Balchin*, 5 Exch. 378; *Griffin v. Coleman*, 4 H. & N. 265; 28 L. J., Ex. 134; *Wright v. Court*, 4 B. & C. 596; except in the case of a breach of the peace committed, in his presence, or in the presence of some one else, who gives the person committing it into custody, there being a danger of renewal; *Timothy v. Simpson*, 1 C. M. & R. 757; *Derecourt v. Corbishley*, 5 E. & B. 188; 24 L. J., Q. B. 313;

R. v. Light, *Bears. & Bell*, 332; 27 L. J., M. C. 1; but if there be no such danger, and the arrest be not the result of a continued pursuit, the arrest is unlawful. *R. v. Walker*, *Dearsley*, 358; 23 L. J., M. C. 123. The Police Acts, in certain cases, authorise a constable to arrest persons found committing offences under those acts, or suspected of having committed certain misdemeanors, without a warrant; see 2 & 3 V. c. 47, ss. 66, 69. A policeman, at a station, is justified, under sect. 69, in detaining a person brought there in charge, and delivered to his custody, although the original arrest may have been illegal. *Bowditch v. Fosberry*, 19 L. J., Ex. 339. A constable is bound to take the person arrested before a justice as soon as he reasonably can. S. C. He is in no case justified in handcuffing a prisoner, unless it be necessary to prevent an escape, or an escape be attempted. *Wright v. Court*, *ante*, p. 1135.

Limitation of action.] The stat. 56 & 57 V. c. 61, s. 1 (*a*), *ante*, p. 1131, replacing 24 G. 2, c. 44, s. 8, requires the action to be brought within six calendar months next either after the act complained of, or after the ceasing thereof. As to how the six months are to be calculated, *vide post*, p. 1141.

As to when a person is entitled to benefit of provisions of this kind, see *post*, pp. 1141 *et seq.* Where some constables, under a warrant to search for black cloth which had been stolen, finding no black cloth, took cloth of other colours, and carried it before a magistrate, refusing at the same time to tell the owner of the house searched whether they had any warrant to do so, it was held that they were within stat. 24 G. 2, c. 44, s. 8, and that the action ought to have been commenced within six months. *Smith v. Wiltshire*, 2 B. & B. 619. So, where a constable, acting under a warrant, commanding him to take the goods of A., took the goods of B., believing them to belong to A.; it was held, that the action must be brought within six months. *Parton v. Williams*, 3 B. & A. 330.

Tender of amends.] Tender of amends before action may be pleaded under 56 & 57 V. c. 61, s. 1 (*c*).

Costs.] As to the special provisions as to the defendant's costs, see 56 & 57 V. c. 61, s. 1 (*b, c, d*), *ante*, pp. 1131, 1132.

2. Actions against Justices.

In an action against a justice of the peace, the plaintiff, in addition to his proof of trespass or other grievance, must, when it is denied by the defence, prove the commencement of the action in proper time; and (in certain cases) malice and the want of probable cause. In some cases also it is necessary to prove that the conviction or order, if any, under which the alleged grievance was committed, has been quashed.

Jervis's Act—Stat. 11 & 12 V. c. 44.] By this act, sect. 1, after reciting, "that it is expedient to protect justices of the peace in the execution of their duty," it is enacted, "that every action hereafter to be brought against any justice of the peace for any act done by him in the execution of his duty as such justice, with respect to any matter *within his jurisdiction* as such justice, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done maliciously and without reasonable and probable cause, and if at the trial of any such action, upon the general issue being pleaded, the plaintiff shall fail to prove such allegation, he shall be nonsuit, or a verdict shall be given for the defendant."

By sect. 2, "For any act done by a justice of the peace *in a matter of which*

by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction or order made, or warrant issued, by such justice in any such matter, may maintain an action against such justice in the same form and in the same case as he might have done before the passing of this act, without making any allegation in his declaration that the act complained of was done maliciously, and without reasonable and probable cause:—*Provided*, nevertheless, that no such action shall be brought for anything done under such conviction or order until after such conviction" [or order?] "shall have been quashed, either upon appeal or application to Her Majesty's Court of Queen's Bench; nor shall any such action be brought for anything done under any such warrant which shall have been issued by such justice to procure the appearance of such party, and which shall have been followed by a conviction or order in the same matter, until after such conviction or order shall have been so quashed as aforesaid; or if such last-mentioned warrant shall not have been followed by any such conviction or order, or if it be a warrant upon an information for an alleged indictable offence, nevertheless if a summons were issued previously to such warrant, and such summons were served upon such person, either personally or by leaving the same for him with some person at his last or most usual place of abode, and he did not appear according to the exigency of such summons, in such case no such action shall be maintained against such justice for anything done under such warrant."

By sect. 3, "Where a conviction or order shall be made by one or more justice or justices of the peace, and a warrant of distress or of commitment shall be granted thereon by some other justice of the peace *bonâ fide* and without collusion, no action shall be brought against the justice who so granted such warrant, by reason of any defect in such conviction or order, or for any want of jurisdiction in the justice or justices who made the same, but the action (if any) shall be brought against the justice or justices who made such conviction or order."

By sect. 4, "Where any poor rate shall be made, allowed and published, and a warrant of distress shall issue against any person named and rated therein, no action shall be brought against the justice or justices who shall have granted such warrant, by reason of any irregularity or defect in the said rate, or by reason of such person not being liable to be rated therein; and that in all cases where a discretionary power shall be given to a justice of the peace by any Act or Acts of Parliament, no action shall be brought against such justice for or by reason of the manner in which he shall have exercised his discretion in the execution of any such power."

By sect. 5, no action lies against a justice for having obeyed a rule made by the K. B. Division under this section.

The 20 & 21 V. c. 43, which enables justices, on summary convictions, &c., to state a case for the opinion of one of the superior courts, gives power (by sect. 9), after a conviction or order has been confirmed or amended on appeal, to the justices who stated the case, or any others having the same jurisdiction, to enforce the order or conviction; and no action or proceeding shall be had against the justices for enforcing such conviction or order, by reason of any defect in the same.

These acts protect members of a county council, acting under the jurisdiction of the magistrates transferred to them by the Local Government Act, 1888; see sects. 28, 100.

Form and cause of action.] The 11 & 12 V. c. 44, ss. 1, 2, are material changes in the law relating to this head. The following cases have been decided on them.

An action of replevin may, it seems, be maintained by the owner against

the magistrates who issue a warrant of distress upon his goods, subject, however, to the provisions of the above act. *Jones v. Johnson*, 5 Exch. 862.

Sect. 2 applies only where the act for which the plaintiff is suing is an act in excess of the jurisdiction of the justice. *Barton v. Bricknell*, 13 Q. B. 393. In trespass *de bonis*, &c., the grievance was a distress for levying a penalty in a matter within the defendant's jurisdiction, and the conviction had been quashed because it contained an illegal alternative of confinement in the stocks for non-payment: it was held, that the case was within sect. 1, and not sect. 2, and *semble*, if the defendant had committed to the stocks, trespass would have lain. S. C. Trespass *de bonis* and for imprisonment: the plaintiff had been convicted in a matter within the jurisdiction of the defendant, and the warrant under which the defendant justified recited a conviction *with costs* not really contained in it, and which had been quashed. Held, that this was an excess of jurisdiction, and within sect. 2. *Leary v. Patrick*, 15 Q. B. 266; 19 L. J., M. C. 211. If justices issue a warrant under 2 & 3 V. c. 84, s. 1, to distrain on overseers who have been illegally ordered by guardians of a union to pay contribution, it is a case of want of jurisdiction within sect. 2, and trespass lies. *Newbold v. Coltman*, 6 Exch. 189. Mere informality in orders in a matter in which justices have jurisdiction, as in a levy for church rates, will not deprive them of the benefit of sect. 1; *Ratt v. Parkinson*, 20 L. J., M. C. 208; and *per Jervis, C.J., Ib.*, "excess of jurisdiction," in sect. 2, means doing what the justices could not possibly have a legal right to do. See *Bott v. Ackroyd*, 28 L. J., M. C. 207. A summons to appear *after* conviction is not a summons within the last part of the proviso in sect. 2; and *semb.* if the party summoned *before* conviction appear by counsel or solicitor, it is an appearance within the same section. *Bessell v. Wilson*, 1 E. & B. 489; 22 L. J., M. C. 94. If the warrant of the defendant be put in by the plaintiff, it is evidence for the defendant of the previous information on oath recited in it. *Huylock v. Sparke*, 1 E. & B. 471; 22 L. J., M. C. 67.

Where a justice acts as such out of the territorial limits of his jurisdiction, it is (except in cases authorised by statute) an excess or want of jurisdiction within sect. 2. *Semb. Arnold v. Dimsdale*, 2 E. & B. 580; 22 L. J., M. C. 161 (where this is taken for granted). The owners and occupiers of abbey lands were empowered to rate themselves, the rates to be enforced by distress warrant issued by a justice of the peace. The plaintiff, whose land was not abbey land, was distrained upon by virtue of a warrant issued by the defendant, a justice. It was held, that he was entitled to maintain an action of trespass. *Pedley v. Davis*, 10 C. B., N. S. 492; 30 L. J., C. P. 347. A justice of the peace, who issues a warrant to enforce payment under a bastardy order, is protected by sect. 1, although he knew that proceedings by appeal had commenced, there being no allegation of malice; for he is acting within his jurisdiction, and granting a case is no suspension of his power. And *quære*, even if it had suspended his power, whether he would not still have been protected? *Kendall v. Wilkinson*, 4 E. & B. 680. It would seem from the judgment of the court in *Kirby v. Simpson*, 10 Exch. 358 (cited *post*, p. 1141), that the omission of proper allegations of malice or of reasonable cause would, if necessary, be amended at the trial where the notice is regular.

In *Sommerville v. Mirehouse*, 1 B. & S. 652, an action against justices, for making an order against the plaintiff for payment of a church rate, although he proved that they had no jurisdiction, according to 11 & 12 V. c. 43, s. 11, as the rate had been demanded more than six months before the information, the defendants pleaded that a fresh demand was made less than six months before the information. It was held that they were not liable, as it did not appear that they had been actuated by malice. In *Pease v. Chaytor*, 1 B. & S. 658; 31 L. J., M. C. 1, the declaration stated that the plaintiff was summoned before the defendants for refusing to pay a church rate, the validity

of which he honestly disputed, and gave the defendants notice; that they nevertheless, not acting *bonâ fide* in the belief that they were acting in conformity with law, and knowing that they had no jurisdiction, made an order for payment of the rate, and issued a distress warrant against the plaintiff's goods. It was held, on demurrer, that where the allegations in the declaration were sufficient to show that the defendants acted without jurisdiction, it was not necessary to allege that they had acted maliciously and without reasonable or probable cause. A direction to the jury that if the plaintiff *bonâ fide* intended to dispute, and did dispute the validity of the rate, and gave notice to the defendants, who, notwithstanding, determined to proceed, the plaintiff was entitled to recover; but if the jury thought that the objections made by the plaintiff were merely a pretext for the purpose of ousting the jurisdiction of the justices the defendants must succeed, was held imperfect, as the jury were not asked whether the defendants decided honestly upon the evidence before them, which they might have done; in which case, without malice and want of reasonable cause, they would not be liable, as they had jurisdiction to decide, for the time being, on the *bona fides* of the plaintiff. S. C., 3 B. & S. 621; 32 L. J., M. C. 121.

In an action against a magistrate for a malicious conviction, the question is, not whether there was any actual ground for imputing the crime to the plaintiff, but whether upon the hearing there *appeared* to be none. The plaintiff must prove a want of a probable cause for the conviction, which he can only do by proving what passed upon the hearing before the magistrate when the conviction took place. The magistrate has nothing to do with the guilt or innocence of the offender except as appears from the evidence laid before him. *Burley v. Bethune*, 5 Taunt. 580.

It would seem from the principle laid down in *Low v. Llewellyn*, (1906) 1 K. B. 487, C. A., *cited ante*, p. 865, in which it was held that an action would not lie against a justice of the peace for words, maliciously and without reasonable and probable cause spoken by him in the course of the discharge of his judicial duty, that no action will lie against a justice of the peace for an act done by him in his *judicial* capacity, and in respect of a matter within his jurisdiction. See also *Scott v. Stansfield*, L. R., 3 Ex. 220, *Dawkins v. Paulet*, L. R., 5 Q. B. 94 and *Id. v. Ld. Rokeby*, L. R., 8 Q. B. 255, Ex. Ch.; L. R., 7 H. L. 744; *cited ante*, p. 865, and *Gelen v. Hall*, 2 H. & N. 379; 27 L. J., M. C. 78; and *Fray v. Blackburn*, 3 B. & S. 576.

It is not material that a conviction should be drawn up formally, at the time when it takes place; for it is only a formal record of what has been done by the court. It will properly bear date at the time when in fact it took place, and the court will give credit to it as to a conviction made at that time, when produced in a collateral proceeding, such as an action of trespass. *Gray v. Cookson*, 16 East, 20; *Massey v. Johnson*, 12 East, 82; *Gimbert v. Coyney*, McCl. & Y. 478; see *Chaney v. Payne*, 1 Q. B. 712. But, in general, an *order*, or a *warrant* of commitment cannot be so drawn up *ex post facto*; for it ought to be legal and effectual at the time of enforcing it. *R. v. Cheshire*, 5 B. & Ad. 439; *Hutchinson v. Lowndes*, 4 B. & Ad. 118. Though in the case of proceedings in a court of record this is otherwise; *vide Kemp v. Neville*, *ante*, p. 919. Where a justice, instead of drawing up a regular conviction, ordered the offender into custody till he could settle the matter with the prosecutor, which he accordingly did and was dismissed, it was held that the justice could not justify in an action of trespass. *Bridgett v. Coyney*, 1 M. & Ry. 211, *cited ante*, p. 921.

The acts of a justice who was not duly qualified by taking the oaths, &c., were not absolutely void, so as to make him a trespasser. *Margate Pier Co. v. Hamam*, 3 B. & A. 266. Property qualification is not now required; stat. 6 E. 7, c. 16, s. 1.

Evidence to connect the justice with the trespass, and the warrant with the conviction.] In case of imprisonment under the warrant of a magistrate, in order to connect the magistrate with the act, a notice to produce the warrant should be served upon the defendant, if the warrant be in his possession, so as to enable the plaintiff to give secondary evidence of its contents. But if the warrant remain in the hands of the officer, he must be served with a *subpoena duces tecum*. A copy of it may be obtained by proceeding under 24 G. 2, c. 44, s. 6, *ante*, pp. 1133, 1134. The connection between the justice and the officer may likewise be proved, by showing that the former has recognized the acts of the latter.

In order to render the conviction a good defence at common law, it must be connected with the warrant of commitment, and if it be a conviction for an offence differing from that recited in the commitment, it will furnish no justification. *Rogers v. Jones*, 3 B. & C. 409. Where the warrant and conviction state all the circumstances which are essential to give them validity, and are connected by internal reference, no other evidence appears to be necessary than the production of them. *Strickland v. Ward*, 12 East, 74, n.; see further, as to proof of conviction, *ante*, pp. 108, 109.

Damages.] By the 11 & 12 V. c. 44, s. 13, "In all cases where the plaintiff in any such action shall be entitled to recover, and he shall prove the levying or payment of any penalty or sum of money under any conviction or order as parcel of the damages he seeks to recover, or if he prove that he was imprisoned under such conviction or order, and shall seek to recover damages for any such imprisonment, he shall not be entitled to recover the amount of such penalty or sum so levied or paid, or any sum beyond the sum of 2*l.* as damages for such imprisonment, or any costs of suit whatsoever, if it shall be proved that he was actually guilty of the offence of which he was so convicted, or that he was liable by law to pay the sum he was so ordered to pay, and (with respect to such imprisonment) that he had undergone no greater punishment than that assigned by law for the offence of which he was so convicted, or for non-payment of the sum he was so ordered to pay." The provision as to costs is repealed by 56 & 57 V. c. 61, s. 2 (*d*), and sect. 1, (*b, c, d*) substituted; *vide ante*, pp. 1131, 1132.

Defence.

The defendant must now plead specially any defence he may have; he can no longer raise it under "not guilty by statute;" see 56 & 57 V. c. 61, s. 2 (*e*). Want of notice of action, *Id.* s. 2 (*c*); or wrong venue, *Id.* s. 2 (*a*), is no longer a defence. Special defences are given by *Id.* s. 1, *vide ante*, p. 1131. As to what acts this section applies, *vide ante*, pp. 1132, 1133, and *post*, pp. 1141 *et seq.*

An act may, it seems, be protected by 56 & 57 V. c. 61, s. 1, although done maliciously and without reasonable or probable cause. *Kirby v. Simpson, post*, p. 1141. And although done without jurisdiction, as where one magistrate only, instead of two, committed the mother of a bastard child. *Weller v. Toke*, 9 East, 364. So, where he has authority over the subject-matter of the complaint, though the place where the offence is committed is not within his jurisdiction. *Prestidge v. Woodman*, 1 B. & C. 12. So, where a magistrate committed a driver for being on the shafts of a cart standing still, the act only authorising commitment for riding on them. *Bird v. Gunston*, cited in *Cook v. Leonard*, 6 B. & C. 354. Where the capacity in which the party acted is equivocal, as where a lord of a manor, being also a justice of the peace, seized a gun in the house of an

unqualified person, it will be presumed that he acted as a justice. *Briggs v. Evelyn*, 2 H. Bl. 114.

It seems that it is for the judge to determine (under 11 & 12 V. c. 44, s. 2) whether the defendant was acting *bona fide* in the execution of his office as justice, and therefore within the protection of 56 & 57 V. c. 61, s. 1. *Kirby v. Simpson*, 10 Exch. 358; 23 L. J., M. C. 165, *per* Parke, B. In an action under 11 & 12 V. c. 44, s. 1, the plaintiff's own case admits that the defendant was in the execution of his office, and the question of *bona fides* does not arise. The defendant cannot claim the benefit of the statute unless he be in fact a justice; but it was unimportant whether he were qualified. *Margate Pier Co. v. Hannam*, cited *ante*, p. 1139.

Where the act in question has not been done in the capacity of a justice, and cannot be referred to that character, he is not protected by 56 & 57 V. c. 61, s. 1. *James v. Saunders*, 10 Bing. 429; *Morgan v. Palmer*, 2 B. & C. 729. As in an action against a justice for not being duly qualified. *Wright v. Horton*, Holt, N. P. 458. But qualification by estate is not now required; stat. 6 E. 7, c. 16, s. 1.

[*Limitation of action.*] Stat. 56 & 57 V. c. 61, s. 1 (a), *ante*, p. 1131, replacing 11 & 12 V. c. 44, s. 8, requires the action to be brought within six calendar months next, either after the act complained of, or after the ceasing thereof.

Where on an illegal conviction by the defendant a fine was imposed on the plaintiff followed by a distress warrant on default of payment, the statute runs from the entry on the plaintiff's premises under the warrant. *Polley v. Fordham*, (1904) 2 K. B. 345. The six months are to be reckoned exclusive of the day of committing the act; *Clarke v. Davey*, 4 Moore, 465; for instance, if the imprisonment or cause of action ends on Dec. 14th, it is a sufficient commencement of the action if the writ issue on June 14th. *Hardy v. Ryle*, 9 B. & C. 603; and see *Freeman v. Read*, 4 B. & S. 174; 32 L. J., M. C. 226, cited *post*, p. 1145. In case of a continuing imprisonment, a justice is liable to answer for such part of it, suffered under his warrant, as was within six calendar months before the action commenced. *Mussey v. Johnson*, 12 East, 67, 76; but it seems that in such case, if the action be brought within six months of the end of the imprisonment, he is liable in respect of the whole imprisonment, see *Harrington, El. of*, v. *Derby Cor.*, *ante*, p. 1133.

The 53 G. 3, c. 127, s. 12, limited the time for commencing any action for a distress for church rate to 3 calendar months. The 3 months so limited are to be reckoned from the time at which the distress was sold. *Collins v. Rose*, 5 M. & W. 194; 7 Dowl. 796. In *Pease v. Chaytor*, 3 B. & S. 621; 32 L. J., M. C. 121, the defendants made an order for the payment of a rate on Jan. 6th. The distress warrant was signed on Feb. 3rd, and goods of the plaintiff seized on Mar. 14th. The order was quashed upon certiorari on May 9th, and an action commenced on June 13th. It was held, that although the action was too late as regarded the making of the order and the expense of quashing it, yet that the defendants might sue for the seizure.

[*Tender of amends.*] Tender of amends before action may be pleaded under 56 & 57 V. c. 61, s. 1 (c); see also (d), *ante*, p. 1131. Sect. 2 repeals 11 & 12 V. c. 44, ss. 10, 11.

3. Actions against Persons acting in Execution of Statutes.

There are many Acts of Parliament, private, local, and personal, and public and general, containing provisions which protect officers and persons acting in the execution of their several duties or powers. Their general

object is to require previous notice of action; to limit the time of its commencement; to allow a general defence to be pleaded; and to enable the defendant to tender amends. So far as such provisions, contained in any *public general* statute passed prior to Dec. 5th, 1893, relate to any proceeding to which 56 & 57 V. c. 61 applies, they are repealed by *Id.* s. 2, and the special protection afforded by sect. 1 is substituted. *Vide ante*, pp. 1131 *et seq.*

The Limitations of Actions and Costs Act, 1842, 5 & 6 V. c. 97, enacts, as to "all acts commonly called *public, local and personal*; or *local and personal*;" or "*acts of a local and personal nature*," that the privilege of showing special matter under the general issue shall be repealed (sect. 3); and that the period of limitation for anything done under such act shall be two years, or, in case of continuing damage, one year after it shall have ceased (sect. 5). By the Interpretation Act, 1889 (52 & 53 V. c. 63), s. 9, *ante*, p. 104; every act passed after the year 1850 shall be a public act, and judicially noticed as such, unless the contrary be expressly provided. But, this section does not extend the previous enactment to public acts of a general nature, and these are now governed by 56 & 57 V. c. 61, *ante*, p. 1131.

The stat. 5 & 6 V. c. 97, affects only statutes passed prior to Aug. 10th, 1842. *Boden v. Smith*, 18 L. J., C. P. 121, decided on sect. 5. An act for establishing a local court of requests is within it. *Cock v. Gent*, 12 M. & W. 234. See also *Shepherd v. Sharp*, 1 H. & N. 115, Ex. Ch.

As to railway companies acting under their several special acts, *vide ante*, p. 1117. As to persons acting under the customs laws, see the Customs Laws Consolidation Act, 1878, 39 & 40 V. c. 46, s. 267.

[*Not guilty by statute.*] In an action for acts done by the defendant under any public statute which allows him to plead "not guilty by statute," he may still so plead, unless the proceeding be one to which 56 & 57 V. c. 61, s. 1, applies. See *Id.* s. 2, *ante*, p. 1131, and cases cited *ante*, pp. 1132, 1133. So where the privilege is given by any local or personal act passed subsequently to Aug. 10th, 1842, *vide supra*. This defence has the same effect as the plea of "not guilty by statute" previously had; Rules, 1883, O. xix. r. 12, *ante*, p. 309. By O. xxi. r. 19, *ante*, p. 310, the defendant when so pleading must insert in the margin of his pleading a reference to the statutes on which he relies; otherwise the defence will be treated as not pleaded under any statute. The defence itself so pleaded, in its effect and consequences, remained altogether unaltered by this rule. *Bartholomew v. Carter*, 3 M. & Gr. 125, *per* Tindal, C.J. And, it let in, not only the defences peculiar to the statute, under which it was pleaded, but also those which were available under it at common law. *Ross v. Clifton*, 11 Ad. & E. 631; *Williams v. Jones*, *Id.* 643; *Eagleton v. Gutteridge*, 11 M. & W. 465. And this is still the effect of the defence, *vide supra*. Mistakes or omissions in the marginal note are amendable under O. xxviii. r. 1, *ante*, p. 293; as where it omits some or one of the statutes relied upon; *Edwards v. Hodges*, 15 C. B. 477; 24 L. J., M. C. 81; but it must be borne in mind that an amendment of this kind will sometimes be made at the trial only on terms which may be very onerous to the defendant. Where, however, no objection has been taken at the trial to the marginal note, the plaintiff cannot afterwards raise the question on a subsequent motion, where the point was argued, as to whether the justification was proved. *Burridge v. Nicholletts*, 6 H. & N. 383; 30 L. J., Ex. 145.

The defence of Not guilty by statute, cannot apply to claims founded on malice, for if the act were malicious and without probable cause it would not be done in pursuance of the statute. *Keighley v. Bell*, 4 F. & F. 763, 792; and *Dawkins v. Rokeby, Ltd.*, *Id.* 806, 825, *per* Willes, J.

Notice of action.] The following collection of cases has been retained for convenience of reference, but it must be remembered that notice of action is no longer required by any public general statute passed prior to Dec. 5th, 1893, in proceedings to which 56 & 57 V. c. 61, s. 1, applies. See *Id.* s. 2, *ante*, p. 1131, and cases cited *ante*, pp. 1132, 1133. As a general rule it may be laid down that under a statute giving a person a right to notice of action, he is entitled to such notice if he *bonâ fide* believed that the act complained of was done by him in the execution of his duty, or in pursuance of the statute requiring notice of action; *Booth v. Clive*, 10 C. B. 827; 20 L. J., C. P. 151; *Read v. Coker*, 13 C. B. 850; 22 L. J., C. P. 201; and that the question for the jury, in order to ascertain whether the defendant falls within the protection of these statutes, is, "Did the defendant honestly believe in the existence of those facts, which, if they had existed, would have afforded a justification under the statute?" *Hermann v. Sceneschal*, 13 C. B., N. S. 392; 32 L. J., C. P. 43; *accord. Roberts v. Orchard*, 2 H. & C. 769; 33 L. J., Ex. 65, Ex. Ch. Although there must be facts on which the defendant's belief could be based, the jury are not to consider the reasonableness of that belief. *Chamberlain v. King*, L. R., 6 C. P. 474, explaining *Leete v. Hart*, L. R., 3 C. P. 322. If the facts believed by the defendant, if existing, would constitute no defence, he is not entitled to notice. S. C. It is not necessary that the defendant should have known of the existence of the statute, or have known what was the governing statute; *Read v. Coker*, *supra*; and all difficulty of this nature is got rid of by the above rule; *per Williams, J.*, in *Roberts v. Orchard*, *supra*.

An action may be brought without notice where its real object is to restrain, by injunction, an immediate injury, although damages are also claimed; *Flower v. Local Board of Low Leyton*, 5 Ch. D. 347, C. A.; *Chapman v. Auckland Union*, 23 Q. B. D. 294, C. A.; and in such case the court may, in lieu of an injunction, award damages for prospective injury. S. C.

A person was not entitled to notice of action as a justice, constable, or other officer, because he *bonâ fide* believed he was such, he not being so in fact. *Hughes v. Buckland*, 15 M. & W. 356; *per Parke, B.*; *Lidster v. Borrow*, 9 Ad. & E. 654. But where trustees are by statute entitled to notice of action, they are entitled to such notice if they are trustees *de facto*; *Hughes v. Buckland*, *supra*, *per Parke, B.*; so, in the case of a public officer *de facto*, as a bailiff. *Braham v. Watkins*, 16 M. & W. 77. A surveyor of the highways informally appointed, who acted *bonâ fide*, was held entitled to notice of action under the Highway Act. *Huggins v. Wayley*, 15 M. & W. 357. So a person who, although disqualified, acts in the *bonâ fide* belief that he is a member of a local authority, was entitled to notice under the Public Health Act, 1875, s. 264. *Lea v. Facey*, 19 Q. B. D. 352, C. A. Where an action was brought against the servant of a person, who *bonâ fide* believed himself to be the owner of a fishery, and had reasonable grounds for such belief, but who was not so, for an act which would have been justified under the 7 & 8 G. 4, c. 29, s. 63 (replaced by 24 & 25 V. c. 96, s. 103), if he had been such owner, and the act gave protection to any person for anything done in pursuance of it; it was held, that the defendant was entitled to notice of action. *Hughes v. Buckland*, *supra*; *Allen v. Preece*, 10 Exch. 443; 24 L. J., Ex. 9.

In order to give the protection of a statute, the specific act need not be authorised by the statute; thus surveyors of highways were held entitled to notice of an action brought for injury sustained by the plaintiffs, from an obstruction negligently left on the highway, by the person employed by the defendants, to erect a weighing machine, though there is no express power in 5 & 6 W. 4, c. 50, to erect weighing machines. *Hardwick v. Moss*, 7 H. & N. 136; 31 L. J., Ex. 205. A surveyor under that act negligently leaving heaps

of gravel on the road was entitled to notice. *Davis v. Curling*, 8 Q. B. 286. Improvement Commissioners, under a local act, sued for the negligence of their servants, are entitled to notice of action. *Mason v. Birkenhead Improvement Commissioners*, 6 H. & N. 72; 29 L. J., Ex. 407. Where the bailiff of a county court, under a warrant against the goods of A. took those of B., he was entitled to notice of action. *Burling v. Harley*, 3 H. & N. 271; 27 L. J., Ex. 258. As to notice of action for arrest by customs' officer on suspicion of felony, see *Spitty v. Kitchen*; *Rose v. Id.*, 15 W. R. 903, T. T. 1869, Q. B.

Omission to do something required by the act will entitle the defendants to notice. *Newton v. Ellis*, 5 E. & B. 115; 24 L. J., Q. B. 337; *Wilson v. Halifax, Mayor of*, L. R., 3 Ex. 114; *Jolliffe v. Wallasey Local Board*, L. R., 9 C. P. 62, under 11 & 12 V. c. 63, s. 139 (now repealed); *Poulsum v. Thirst*, L. R., 2 C. P. 449, under 25 & 26 V. c. 102, s. 106.

The usual clause of protection in railway acts, does not make a notice necessary where the company are sued for negligence as carriers. *Carpue v. L. & Brighton Ry. Co.*, 5 Q. B. 747; *Palmer v. Grand Junction Ry. Co.*, 4 M. & W. 749; *vide ante*, p. 1117. A person employed by a building owner to erect a building, adjoining the house of another, was not within the protection of the Metropolitan Building Act, 1855, s. 108, which applied to any district surveyor or other person, for anything done or intended to be done, in pursuance of the Act. *Williams v. Golding*, L. R., 1 C. P. 69. So, the protection given by the Larceny Act, 1861 (24 & 25 V. c. 96), s. 113, for things "done in pursuance of the act," had no application to the case of a private individual, prosecuting another for felony. *Mercer v. Gooch*, 15 L. T. 219, M. T. 1866, Ex. It was a question for the jury under sects. 103, 113, whether the plaintiff was "immediately apprehended." *Griffith v. Taylor*, 2 C. P. D. 194, C. A. Where the defendant was a contractor, who did work for a district board of works, and injury was occasioned by one of the defendant's horses and carts which had been left unattended in a street; it was held, that he was not entitled to notice under the Metropolitan Management Act, 1862, s. 106, as the injury was not done or intended to be done, under the powers of the Act, but was purely collateral. *Whatman v. Pearson*, L. R., 3 C. P. 442. *Secus*, where, the act complained of was done by the defendant, by order of the district board. *Chambers v. Reid*, 13 L. T. 703; H. T., 1866, Q. B. So where the defendants, a vestry, supplied carts for watering the roads, and the plaintiff, the servant of a contractor who horsed and drove their carts, sustained injury through a defect in a cart driven by him, the defect arising from the defendants' negligence. *Edwards v. Vestry of St. Mary, Islington*, 22 Q. B. D. 338. See also *Poulsum v. Thirst*, *supra*.

The necessity of giving notice of action is not in general limited to actions for torts. Thus, it was required before an action *ex contractu*, to recover back money, *bonâ fide* but illegally received, could be sustained against a turnpike collector. *Waterhouse v. Keen*, 4 B. & C. 200. So, in the case of highway rates, received by the surveyors under an invalid rate. *Selmes v. Judge*, L. R., 6 Q. B. 724. So, in the case of money received by a local board from an adjoining owner, for the cost of paving a road, which he was not liable to pave. *Midland Ry. Co. v. Withington Local B.*, 11 Q. B. D. 788, C. A. So, where they illegally forced him to expend money on work they were liable to do themselves. *Cree v. St. Pancras Vestry*, (1899) 1 Q. B. 693. So, in the case of excessive charges received by a railway company. *Kent v. Gt. W. Ry. Co.*, 3 C. B. 714, cited *ante*, p. 1117. But it was not in general necessary to give a notice of action, before suing on a specific contract, as a building contract with a board of health. *Darvies v. Swansea, Mayor of*, 8 Exch. 808; *Dearle v. Petersfield Union*, 21 Q. B. D. 447, 452, C. A. Where a local act directed

that the guardians, &c., of a parish should be sued in the name of their vestry clerk, and required notice to be given of any action, for anything done in pursuance of the act, it was held, that notice was not necessary in an action for work and labour. *Fletcher v. Greenwell*, 4 Dowl. 166. Notice was not necessary under the Public Health Act, 1875, s. 264, before an action for the recovery of land against a local authority. *Foul v. Mayor, &c. of Margate*, 11 Q. B. D. 299.

If a person make a wrongful distress for two causes, for one of which only he is entitled to notice of action, he may be sued in respect of the other without giving him notice of action. *Lamont v. Southall*, 5 M. & W. 416.

The intended plaintiff should give the notice. Sometimes the statute requiring the notice allows it to be given by a solicitor or agent, on his behalf. Where a notice of action was given on behalf of two, one of whom was dead, and the action was brought in the name of the other, the court held the notice insufficient. *Pilkington v. Riley*, 3 Exch. 739 (under 3 & 4 W. 4, c. 90, s. 69). Where a statute required a notice of action to be given "by the attorney or agent of the party"; it was held that a notice of action might be given by the *prochein amy* of an infant, although he might not be the *prochein amy* on the record. *De Gondouin v. Lewis*, 10 Ad. & E. 117.

The notice should be given to the intended defendant or, if it is intended to make more than one person defendant in the action, the notice should be given to all the defendants entitled to notice. In a case where the same party acted as a clerk to two public bodies, and a notice of action was given addressed to him as clerk of the one body, the cause of action arising under the supposed authority of the other body, it was held that the notice was insufficient. *Hider v. Dorrell*, 1 Taunt. 383.

By the 5 & 6 V. c. 97, s. 4, "In all cases where notice of action is required, such notice shall be given *one calendar month* at least before any action shall be commenced; and such notice of action shall be sufficient, any act or acts to the contrary thereof notwithstanding." In reckoning the calendar month in a notice of action, both the day of delivering the notice and that of issuing the writ must be excluded. *Young v. Higgon*, 6 M. & W. 49 (decided on 24 G. 2, c. 44). Where a notice was given on April 28th, it was held that an action might be commenced on May 29th following; for the principle is that a calendar month cannot have two days with the same number, and the length of the former month is immaterial. *Freeman v. Read*, 4 B. & S. 174; 32 L. J., M. C. 226.

The notice should be a formal notice, and not a mere letter of course. *Lewis v. Smith*, Holt, N. P. 27: *Union Steamship Co., &c. v. Melbourne Harbour Commissioners*, 9 Ap. Ca. 365, J. C. It is usual to state the address and addition of the party to whom the notice is given, but this is not absolutely necessary, unless required by the statute. In general, the intended plaintiff's name and place of abode should be given in the body, or in the indorsement of the notice. *Wood v. Folliott*, 3 B. & P. 552, n. In this case, "William Wood, of Rotherhithe, in the county of Surrey, merchant," was held a sufficient description. It is not in general necessary to state the names of all the parties, intended to be included in the action, or whether the action is to be a joint or several one. *Bax v. Jones*, 5 Price, 168. Where a writ was sued out as described in the notice of action, but afterwards discontinued, and within the time limited by the statute another writ was sued out and served, in which another person was joined as defendant; it was held, that the notice given was sufficient. *Jones v. Simpson*, 1 C. & J. 174. The notice need not, unless the statute require it, state the form of the action to be brought. *Prickett v. Gratrex*, 8 Q. B. 1020; *Pilkington v. Riley*, *supra*. It is sufficient to state the cause of it. *Jones v. Bird*, 5 B. & A. 837. The cause should be stated with clearness and certainty; *Freeman v.*

Line, 2 Chit. 673; *Gimbert v. Coyney*, M'Cl. & Y. 469; but it is sufficient if it inform the defendant substantially of the ground of complaint; *Smith v. W. Derby Local Board*, 3 C. P. D. 423. The time and place of the act complained of, should be stated. *Jacklin v. Fytche*, 14 M. & W. 381; *Breese v. Jerdein*, 4 Q. B. 585. But a mistake therein, not calculated to mislead, is immaterial. *Madden v. Kensington Vestry*, (1892) 1 Q. B. 614. There was a notice of action to magistrates, for that the defendants, "at —, on the 1st day of August," &c., imprisoned the plaintiff, and also for that they, "on the said 1st day," seized plaintiff's goods; it was held that the place first mentioned might apply to the whole subject of complaint. *Leary v. Patrick*, 15 Q. B. 266; 19 L. J., M. C. 211. Where the cause of action is for having done an act maliciously, and without any reasonable or probable cause, the notice should state that the act complained of was so done. *Massey v. Johnson*, 12 East, 67. A notice of action, which stated that the action would be brought for causing a distress to be made, is sufficient, though the action is for trespass. *Hollingworth v. Palmer*, 4 Exch. 267. The notice is sufficient, though it state the act complained of, to have been done by more persons than it really was. *Breese v. Jerdein*, *supra*. A notice under a local Act, that, unless the name of the person on whose information the defendants had taken certain steps was given up, proceedings would be taken against them; *Norris v. Smith*, 10 Ad. & E. 188; or, a letter written to the defendant stating that an action would be brought if no apology were made; *Winyard v. Marks*, 15 L. T. 591; *cor.* Byles, J., were held bad, because they were conditional. It seems that the notice should specify that the action will be commenced at the expiration of the number of days mentioned in the Act. *Norris v. Smith*, *supra*, *per* Patteson, J.

Sometimes the statute requiring the notice, requires the name and place of abode of the intended plaintiff, or his solicitor or agent, to be indorsed on the notice. A direction to indorse the name of the solicitor is complied with by indorsing the initial of the christian name of the solicitor, with his surname and abode at length. *Mayhew v. Locke*, 7 Taunt. 63. It is sufficient if indorsed by a firm of two solicitors, who are partners, and are employed by the intended plaintiff; and is good, though one of the christian names of one be omitted, if there was no other firm of the same surname in the same place at which the notice bore date. *James v. Swift*, 1 D. & Ry. 625; 4 B. & C. 681. And, a solicitor may be described on such a notice, as of the place of his office; *Roberts v. Williams*, 2 C. M. & R. 561; or, as of his residence. S. C. Describing him generally of a large town would not be sufficient, but this would be otherwise if the town be a small one. *Crooke v. Curry*, Tidd's Pr. 9th ed. 30 (c); *Osborn v. Gough*, 3 B. & P. 551. Where the indorsement was, "given under my hand at Durham," without any other notification of residence, it was held to be insufficient, being a mere description, not of residence, but of the place of signature. *Taylor v. Fenwick*, 7 T. R. 635, n. Where the notice was indorsed by A. & B. as attorneys for the plaintiff, and, the partnership having been dissolved, the action was brought by A. only, this was held to be no ground of objection. *Hollingworth v. Palmer*, *supra*. If the solicitor's name and place of abode are in the body instead of on the back of the notice, it seems it is sufficient; for the intent of the statute is, that the justice may be able to tender amends to the party or his solicitor. See *Crooke v. Curry*, *supra*. If the notice be given and served by the party, it is needless to mention the name or abode of any solicitor.

The service should be made as directed by the local statute. In general it is sufficient to serve the notice personally, or leave it for the intended defendant, at his usual place of abode. See *Castle v. Burditt*, 3 T. R. 623. When the act provides that the notice is to be left at the defendant's office, &c., and is so left in due time, it is immaterial that the notice does not reach

the defendant's hands till some days later. *Moody v. Detrick*, 4 F. & F. 938; *Crompton, J.* It is not necessary that the plaintiff or his solicitor should personally serve the notice; service by the solicitor's clerk is sufficient. *Morgan v. Leach*, 10 M. & W. 515.

It is, in general, necessary to plead specially the want of notice of action when required by local and personal statutes; 5 & 6 V. c. 97, s. 3 (cited *ante*, p. 1112). See *Edwards v. Gt. W. Ry. Co.*, 11 C. B. 588; 21 L. J., C. P. 72; *Dacey v. Warne*, 14 M. & W. 199.

Tender of amends does not dispense with proof of proper notice. *Martins v. Upcher*, 3 Q. B. 662. The notice may be proved by a duplicate original without giving a notice to produce; see *ante*, p. 8.

ACTIONS BY EXECUTORS AND ADMINISTRATORS.

Before the act establishing a Court of Probate, 20 & 21 V. c. 77, there were many courts and persons having jurisdiction to grant probates and letters of administration. These powers were, by that Act, transferred to the Court of Probate. A similar Act was also passed for establishing a Court of Probate in Ireland. *Id.* c. 79. By 20 & 21 V. c. 77, s. 23, the Court of Probate was made a Court of Record, and had the same powers, and its grants and orders the same effect throughout all England, and, in relation to the personal estate in all parts of England, of deceased persons, as the Prerogative Court of the Archbishop of Canterbury and its grants and orders respectively, in relation to those matters and causes testamentary, and those effects of deceased persons which were within the jurisdiction of the said Prerogative Court. The jurisdiction of the Court of Probate has been transferred to the High Court of Justice; J. Act, 1873, s. 16, and is by sect. 34 assigned to the Probate, Divorce, and Admiralty Division. Probates and administrations are therefore now sealed with the seal of that Division.

By 20 & 21 V. c. 77, s. 46, a probate, &c., may be granted by the district registrar, if it shall appear by affidavit that the testator or intestate, at time of his death, had a fixed place of abode, therein stated, within the district in which the application is made; and such probate, &c., shall have effect over the personal estate of the deceased in all parts of England.

By sect. 47, such affidavit shall be conclusive for the purpose of authorizing the grant by the district registrar, and no such grant shall be liable to be "impeached by reason that the testator or intestate had no fixed place of abode within the district at the time of his death"; the probate, &c., so granted shall effectually discharge and protect all persons paying to, or dealing with, any executor, &c., thereunder, notwithstanding the want of, or defect in, such affidavit.

By sect. 57, "the affidavit as to the place of abode and state of the property of a testator or intestate, which is to give contentious jurisdiction to the judge of a county court under the previous provisions" in the Act, shall, except for the purpose of staying proceedings in the County Court, be conclusive for the purpose of authorizing the exercise of such jurisdiction, and the grant or revocation of probate or administration in compliance with the decree of such judge.

By sect. 70, the Court of Probate may appoint an administrator *pendente lite*; and he shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate.

By sect. 75, "After any grant of administration, no person shall have power to sue or prosecute any suit, or otherwise act as executor of the deceased as to the personal estate comprised in, or affected by, such grant of administration, until such administration shall have been recalled or revoked." Sect. 76 provides for the mode of proceeding where, before the revocation of any temporary administration, any proceedings at law or in equity have been commenced by or against any administrator so appointed.

By sect. 77, "Where any probate or administration is revoked under this act all payments *bond fide* made to any executor or administrator under such probate or administration, before the revocation thereof, shall be a legal discharge to the person making the same; and the executor or administrator who shall have acted under any such revoked probate or administration may retain and reimburse himself, in respect of any payments made by him, which the person to whom probate or administration shall be afterwards granted, might have lawfully made."

By sect. 78, "All persons and corporations making, or permitting to be made, any payment or transfer *bond fide* upon any probate, or letters of administration granted in respect of the estate of any deceased person under the authority of this act, shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever, affecting the validity of such probate or letters of administration."

By sect. 79, "Where any person, after the commencement of this act, renounces probate of the will of which he is appointed executor, or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects, shall and may, without any further renunciation, go, devolve and be committed in like manner as if such person had not been appointed executor." [And the death of an executor who has never proved, or the non-appearance of an executor cited to prove, has the same effect. See 21 & 22 V. c. 95, s. 16.]

By sect. 86, all grants of probates and administrations made before the commencement of this Act, which were void or voidable from the want of jurisdiction of the courts granting them, were made valid; unless the grants had been already declared void or proceedings were pending in relation thereto.

By sect. 87, "Legal grants of probate and administration made before the commencement of this act, and grants of probate and administration made legal by this act, shall have the same force and effect as if they had been granted under this act."

By the 20 & 21 V. c. 79, s. 95 (the Irish Act) probate or letters of administration granted by the Court of Probate in Ireland may be sealed with the seal of the Court of Probate in England, "and, being duly stamped, shall be of the like force and effect, and have the same operation in England as if it had been originally granted by the Court of Probate in England." The Confirmation and Probate Act, 1858 (21 & 22 V. c. 56) s. 12, contains a similar provision with respect to the sealing of Scotch confirmations of wills, by the Court of Probate in England, and to the effect of such sealing. The jurisdiction of the Irish Probate Court is by the J. Act (Ireland), 1877, s. 21, transferred to the Irish High Court of Justice. The Colonial Probates Act, 1892 (55 & 56 V. c. 6), contains similar provisions as to probates granted in British possessions to which that Act has been applied by an Order in Council.

By the Regimental Debts Act, 1893 (56 & 57 V. c. 5), s. 6 (2), the committee of adjustment prescribed by Royal warrant, are empowered for the purpose of paying the preferential debts (see sect. 1) of any person who has died while subject to military law, to collect the estate of the deceased, and (sect. 6 (6)) for the purpose of the exercise of their duties shall, to the exclusion

of all authorities and persons whomsoever, have the same rights and powers as if they had taken out representation to the deceased.

When executors, &c., may sue.] An executor may sue for a breach of contract made with his testator where it is such as appears by the record to render the personal estate less beneficial to the executor, but not otherwise. 1 Wms. Saund. 217, (a); see *Chamberlain v. Williamson*, *ante*, p. 495. It is immaterial whether the breach occurred before or after the testator's death. Where a passenger B. sustained personal injury through the breach by the defendants of their contract to carry him with due care, of which injury he ultimately died; it was held that B.'s executors might sue for the injury to his estate, in respect of medical expenses thereby incurred, and loss, by reason of B. being prevented, before his death, from attending to his business. *Bradshaw v. Lancashire & Yorkshire Ry. Co.*, L. R., 10 C. P. 189. So, the executor of P. may sue in respect of the breach of a similar contract made by P., with regard to his wife, whereby P. sustained like damage. *Potter v. Metropolitan District Ry. Co.*, 32 L. T. 36, Dec. 2nd, 1874, Ex. Ch. The two cases last cited follow the principles stated in 1 Wms. Exors., 10th ed., pp. 616 *et seq.*, and an action for breach of a statutory duty survives to the plaintiff's executors. *Peebles v. Oswaldtwistle, &c. Council*, (1896) 2 Q. B. 159. But, apart from contract or duty, no action will lie in respect of such damages, resulting from the wrongful act of the defendants. *Pulling v. Gt. E. Ry. Co.*, 9 Q. B. D. 110. A judgment recovered under 9 & 10 V. c. 93, *ante*, p. 810, is no bar to the action. *Leggott v. Gt. N. Ry. Co.*, 1 Q. B. D. 599. If the contract were of such a nature as to be rescinded by the death, no subsequent breach would be possible, but the right of action for any breach which accrued before the death is not thereby divested. *Stubbs v. Holywell Ry. Co.*, L. R., 2 Ex. 311. As to when a contract is rescinded by death, *vide post*, pp. 1151, 1165. As to the enforcement by an executor of a restrictive covenant with respect to land made with his testator, see *Formby v. Barker*, (1903) 2 Ch. 539, C. A.

As to when the executor of the owner in fee of land can sue on covenants running with the land, *vide ante*, pp. 725, 726.

The maxim "*Actio personalis moritur cum personâ*," applied at common law to all actions of tort; but the stat. 4 E. 3, c. 7, enacted that executors should have an action of trespass for goods and chattels of the testator carried away in his lifetime, in like manner as the testator would have had if living. This remedy was extended to the executors of executors by 25 E. 3, stat. 5, c. 5, and to administrators by 31 E. 3, stat. 1, c. 11, or, by an equitable construction of 4 E. 3, c. 7, *supra*; for this last statute, being a remedial act, has always been expounded largely. Therefore, by an equitable construction of the statute, an executor or administrator shall now have the same actions, for any injury done to the personal estate of the testator in his lifetime, whereby it is become less beneficial to the executor, as the testator himself might have had, whatever the form of the action may be. 1 Wms. Saund. 217 a, b, (1), and (e). See *Twycross v. Grant*, 4 C. P. D. 40, C. A., and *Pulling v. Gt. E. Ry.*, *supra*. Although an action for defamation abates by the death of the plaintiff, yet where the publication of a false and malicious statement causes damage to the plaintiff's personal estate, *e.g.*, as being a slander of title to the plaintiff's trade-mark, it survives. *Hutchard v. Mège*, 18 Q. B. D. 771. And an action for infringement of the plaintiff's registered trade-mark, and claiming an account of profits, may be continued by his executors. *Oakey v. Dulton*, 35 Ch. D. 700.

These acts, however, gave the executor no remedy for an injury done to the real estate of the deceased, but now, by 3 & 4 W. 4, c. 42, s. 2, an action may be maintained by the executors, &c., of any person deceased for any

injury to his real estate, committed in his lifetime, for which an action might have been maintained by him, so as such injury shall have been committed within six calendar months before his death, and provided such action shall be brought within one year after his death, and the damages when recovered shall be part of his personal estate. Where A. brought an action against B., claiming an injunction and damages for obstructing the lights of her house, and died more than six months after, it was held that her executor might continue the action for damages accruing within six months from the death. *Jones v. Simes*, 43 Ch. D. 607.

The common law rule is further relaxed by the Fatal Accidents Acts, 1846, 1864. These two acts and the cases decided thereon are collected *ante*, pp. 810 *et seq.*

How executors, &c., are to sue.] An executor *must* sue in his representative capacity, or in the *detinet*, as it was formerly expressed, when the cause of action has accrued in the lifetime of the deceased. 1 Wms. Saund. 112, 112 a, (1); 2 Wms. Exors., 10th ed. 1517. But where the cause of action accrues after the death of the testator, the executor may sue as such, or not, at his option. 1 *Id.* 659 *et seq.*; 2 *Id.* 1517, 1518. Thus he *may* sue in his representative character on contracts made with himself if the money when recovered would be assets. *Cowell v. Watts*, 6 East, 405; *Marshall v. Broadhurst*, 1 C. & J. 405. Thus, where an administrator after the death of the intestate, enters into contracts in the course of carrying on the business of the intestate, for the benefit of the estate, he may sue in his representative capacity. *Moseley v. Rendell*, L. R., 6 Q. B. 338, cited *post*, p. 1151; *Abbott v. Parfitt*, *Id.* 346, explaining *Bolingbroke v. Kerr*, L. R., 1 Ex. 222, where it did not appear that the business was carried on for the benefit of the estate; and see *Aspinall v. Wake*, 10 Bing. 51 & Wms. Exors., 10th ed. 663. By Rules, O. xviii. r. 5, "Claims by or against an executor or administrator as such, may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate, in respect of which the plaintiff or defendant sues, or is sued, as executor or administrator." As to this rule, see *Padwick v. Scott*, 2 Ch. D. 736, 743, *per* Hall, V.-C.

Evidence of title, as executor or administrator.] By Rules, 1883, O. xxi. r. 5, "if either party wishes to deny the right of any other party to claim as executor," or in any representative capacity, "he shall deny the same specifically."

When the plaintiff's representative character is denied, the issue lies on the plaintiff; as to how this is proved, see *Proof and effect of probate and letters of administration*, *ante*, pp. 118, 203. As to the particular case of a life policy effected by a person domiciled abroad, *vide ante*, p. 118.

Questions respecting *bona notabilia* can no longer arise in actions by executors; see sects. 23, 86 (*ante*, pp. 1147, 1148).

With regard to stamp objections to the probate, see *Stamps*, *ante*, p. 270.

It is sufficient if the probate be produced at the trial, for the grant relates back to the testator's death, from which time the executor takes his title by virtue of the testator's will. 1 Wms. Exors., 10th ed. 224, 225. So, where several join in an action, for injury to a leasehold reversion, whose title consists in their being executors, it is enough to produce a probate, granted to one of them only; for this shows the will to be good from which all derive their title. *Walters v. Pfeil*, M. & M. 362. But the title of an administrator, if put in issue, must be proved by the grant of letters of administration *prior* to the commencement of the action, for the title commences from the time of the grant; 1 Wms. Exors. 10th ed. 315; although the grant relates back to the

death for the benefit of the estate. *Morgan v. Thomas*, 8 Exch. 302; *vide ante*, pp. 925, 931. And it seems in the Chancery Division to be sufficient that the letters should be produced at the hearing, see 1 Wms. Exors. 10th ed. 315.

The non-joinder of a co-executor as plaintiff was formerly pleadable in abatement only; 1 Wms. Saund. 291 *k, l*, and any objection on the ground of such non-joinder must now be made before the trial, *vide ante*, p. 91.

[*Vesting of property and evidence of the cause of action.*] An executor or administrator has the property of the goods of the testator or intestate vested in him before actual possession; Com. Dig. Admon. (B. 10); and, though administration be not granted for a long time, yet, when it is granted, it vests the property in the administrator by relation from the time of the death of the intestate; *Id.*; 2 Roll. Ab. Tresp. (T.), pl. 2, 4; *R. v. Horsley*, 8 East, 410, and this has on and since Jan. 1st, 1898, by reason of stat. 60 & 61 V. c. 65, *ante*, p. 1060 applied to freeholds. *In re Pryse*, (1904) P. 301. As to title of executors in ejectment, *vide ante*, pp. 1060, 1061.

With regard to the cause of action, the evidence will be the same as in an action between the defendant and the testator or intestate. But attention must be paid to the form of the statement of claim. Thus, if the defendant ordered a coat to be made by A., whose executor finished and delivered it, the executor cannot sue as for goods sold and delivered by A.; but *seem.*, he must either sue as for sale and delivery by himself as executor, or must claim specially. *Werner v. Humphreys*, 2 M. & Gr. 583, and *Id.* 857, n. A. agreed to do carpenter's work for B., to be paid for on completion; A. died before completion, and the plaintiff, A.'s executor, agreed to complete it: it was held, that the plaintiff could not recover for the work done by A., as a debt due to A. in his lifetime, for there was no debt in A.'s lifetime; but he might recover on a *quantum meruit*, as for a debt due to plaintiff *as executor* for work so done by A. *Crosthwaite v. Gardner*, 18 Q. B. 640; 21 L. J., Q. B. 356. But in such cases an amendment would now no doubt be allowed.

Where B. took out administration to A., and did work, &c., in the course of carrying on A.'s business for the benefit of his estate, and died, the action must be brought by C., the administrator *de bonis non* of A., for work done by B., as administrator. *Moseley v. Rendell*, L. R., 6 Q. B. 338. Where the declaration alleged that the work was done by C. as administrator, the court allowed an amendment. S. C.

See further *Foster v. Bates*, 12 M. & W. 226, cited *ante*, p. 552.

[*Evidence on a defence of Statute of Limitations.*] The statutes of limitations in personal actions will be found *ante*, pp. 677, 719. On a defence of the Statute of Limitations to a statement of claim containing only claims on promises to the testator, and issue thereon, the plaintiff will not be allowed to give evidence of promises or acknowledgments to himself after the death of the testator. *Sarell v. Wine*, 3 East, 409; *Tunmer v. Smart*, 6 B. & C. 608. Action by administrator on a note given by defendant to the intestate; on an issue on the Statute of Limitations, it was held that an agreement between plaintiff and defendant, that defendant should retain the interest on the note, in consideration of his maintaining the child of intestate, was equivalent to payment of interest so as to bar the statute. *Bodger v. Arch*, 10 Exch. 333; 24 L. J., Ex. 19. But it seems that where an acknowledgment is relied on to rebut a defence of the statute, it must now be pleaded specially, *vide ante*, p. 684. As to the use of admissions made in a book of a testator, of the receipt of interest by him, to rebut the statute when set up against his executor, see *Bradley v. James*, 13 C. B. 822; 22 L. J., C. P. 193, and *ante*,

pp. 55, 56, 58, 59. As to acknowledgments, see *Ward v. Hunter*, 6 Taunt. 210, cited *ante*, pp. 684 *et seq.*

Where a person to whom a right of action had accrued during his residence abroad, died there, and he never returned to this country after the accrual of the right, it was held that his executors might sue for it, although more than six years had elapsed since it accrued. *Townsend v. Deacon*, 3 Exch. 706, following *Strithorst v. Grame*, 3 Wils. 145; 2 W. Bl. 723. These cases were decided on the ground that as the plaintiff was beyond seas he was within the disability clause of the Limitation Act, 1623, (21 J. 1, c. 16, s. 7, *ante*, p. 683), and the statute therefore never began to run as long as the testator remained abroad. But since 19 & 20 V. c. 97, s. 10 (*ante*, p. 683), the testator would be barred at the end of six years from the time of action accrued, and, therefore, there seems no reason why his executors should now be entitled to any longer period; for it was held in *Penny v. Brice*, 18 C. B., N. S. 393, that where the cause of action has once accrued, and the statute has begun to run, the executors are barred in the same manner as the testator would have been, and are entitled to no delay in taking proceedings. But in case of disability other than that provided for by 19 & 20 V. c. 97, s. 10, *supra*, the doctrine laid down in *Townsend v. Deacon*, *supra*, seems to apply, and the statute either never runs as against the executor, or only runs from the time of the testator's death; see 3 Exch. 711, 712. Where the cause of action accrues after the death of an intestate, the statute does not begin to run till letters of administration have been taken out. *Cury v. Stephenson*, 2 Salk. 421; *Murray v. E. India Co.*, 5 B. & A. 204; *Burdick v. Garrick*, L. R., 5 Ch. 233, 241; *Atkinson v. Bradford, &c. Building Soc.*, 26 Q. B. D. 377, C. A. Where the cause of action accrues on the day of the intestate's death, in the absence of evidence it will be presumed that the death took place first. S. C., *per* Ld. Esher, M. R., and Lindley, L.J. Where letters of administration are granted on the revocation of probate granted on a forged will, the Statute of Limitations runs from the grant of the letters only. *Chan Kit San v. Ho Fung Hang*, (1902) A. C. 257, J. C. Where the action abated by the death of a plaintiff, his representatives might commence a fresh action within a reasonable period, though the period of limitation had then elapsed, 2 Wms. Saund. 64 a, (6); *Matthews v. Phillips*, 2 Salk. 425. But as by Rules, 1883, O. xvii. r. 1, where the right survives, the death of a plaintiff or defendant does not cause an action to abate, it is not now necessary to commence a fresh action.

Evidence of payment.] Even before the 20 & 21 V. c. 77, payment of a debt to an executor who had obtained probate to a forged will, was a discharge in an action brought against the debtor by the rightful administrator on revocation of the probate. *Allen v. Dundas*, 3 T. R. 125. So, payment to an administrator (before the above act) was a good discharge, though a will existed and was afterwards proved. *Prosser v. Wagner*, 1 C. B., N. S. 289; 26 L. J., C. P. 81. Defendant before probate granted, *bonâ fide* paid money due to the estate, to a feme covert executrix, and at her request. Her husband afterwards dissented from her being executrix; and probate was refused to her; but the defendant had no knowledge of the husband's dissent: held, a good payment as against a co-executor to whom probate was afterwards granted. *Pemberton v. Chapman*, 7 E. & B. 210; 26 L. J., Q. B. 117; Ex. Ch., E. B. & E. 1056; 27 L. J., Q. B. 429. But, a payment of money under the probate of a living person will be void; because in such case the ecclesiastical court has no jurisdiction, and the probate has no effect. *Allen v. Dundas*, 3 T. R. 130; see *Woolley v. Clark*, 5 B. & A. 744. So, payment to a next of kin who is entitled to take out

letters of administration to the intestate, but dies without having done so, is no answer to an action by one who afterwards takes out administration. *Mitchell v. Moorman*, 1 Y. & J. 21; *Mitchell v. Holmes*, L. R., 8 Ex. 119.

As to payments to an executor, &c., being a discharge since the above act after the revocation of the probate, &c., see sects. 77, 78, of the act noticed *ante*, p. 1148.

[*Set-off*.] In an action by an executor in his own name to recover money due to the testator in his lifetime from a third party, and received by the defendant after his death, the defendant cannot set off a debt due to him from the testator. *Shipman v. Thompson*, Willes, 103. So, though the plaintiff claims as executor, if the cause of action really arose after the death of the testator. *Kilvington v. Stevenson*, cited Willes, 264, n. And in an action for money received by the defendant to the use of the plaintiff as executor or administrator, and on an account stated with the plaintiff as executor or administrator, defendant cannot set off moneys lent by him to the testator or intestate. *Rees v. Watts*, 11 Exch. 410; 25 L. J., Ex. 30, Ex. Ch.; *Newell v. National Provincial Bank of England*, 1 C. P. D. 496. And an administration order is an answer to a counter-claim for such a debt. S. C. After such order the rights of the parties cannot be altered by assignment of debt. *Ex pte. Nugee*, *infra*. So, where the plaintiff sues an executor for a debt due from the testator to the plaintiff, the defendant cannot set off a debt for money received by the plaintiff to the use of the defendant as executor, or for money due to the defendant as executor on an account stated between the plaintiff and defendant. *Mardall v. Thelluson*, 6 E. & B. 976. The above decisions turn on the mutuality required by the statute of set-off between the testator or intestate and the other party; there seems no reason, however, why these claims which could not be set off should not be counter-claimed, except where an administration order has been made. A debt due from testator to N. as executor and trustee, cannot be set off against a debt due from N. personally to testator. *Ex pte. Nugee*, L. R., 20 Eq. 29. See further as to set-off, *Taylor v. Taylor*, *Id.* 155.

[*Evidence in action by an executor or administrator against an executor de son tort*.] In an action of trover or trespass by a rightful executor or administrator against an executor *de son tort*, the latter may, in mitigation of damages, give evidence of payments made by himself in the rightful course of administration; but should those payments amount to the full value of the goods claimed, the plaintiff will still, it seems, be entitled to a verdict for nominal damages, and the statement *contra* in B. N. P. 48, seems to be erroneous. *Mountford v. Gibson*, 4 East, 447. And such payments shall not be allowed in damages, if there be a failure of assets, and the lawful executor would thereby be deprived of his right of preferring one creditor to another of equal rank, or giving himself the same preference. 2 Bl. Com. 508; 1 Wms. Exors., 10th ed., p. 195; *Elworthy v. Sandford*, 3 H. & C. 330; 34 L. J., Ex. 42; see also *Layfield v. Layfield* 7 Sim. 172. When an executor *de son tort* has handed or paid over the property to the rightful representative before action, he is not liable. *Hill v. Curtis*, L. R., 1 Eq. 90.

Where an executor under a second will sued the person appointed executor under a prior one, who had administered with knowledge of the later one and the probate to whom was revoked, it was held that the plaintiff might recover the full value of the goods administered. *Wooley v. Clark*, 5 B. & A. 744. In this case the defendant seems to have acted *malâ fide*; *Thomson v. Harding*, *post*, p. 1154. And from a report of the same case, 1 D. & Ry. 409,

it appears that though the court decided in favour of the plaintiff, the amount of damages was referred, so that it cannot be known whether the credit was or was not given to defendant for any payments made by him. A grant of letters of administration to E., obtained on suppressing a will which appointed an executor, is void *ab initio* and all dispositions of the assets by E. are void also, except acts done in due course of administration. *Ellis v. Ellis*, (1905) 1 Ch. 613. In *Thomson v. Harding*, 2 E. & B. 630; 22 L. J., Q. B. 448, a creditor of the deceased was allowed to retain payments made to him by executor *de son tort*, as against one who afterwards administered. It seems, however, that not every act which makes an executor *de son tort*, will be enough to make good a payment by him. The creditor must have reasonable ground for believing him to be lawful executor. S. C.

ACTIONS AGAINST EXECUTORS AND ADMINISTRATORS.

[When executors, &c., may be sued.] Executors are responsible on all the contracts of their testator broken in his lifetime; and also upon all contracts of the testator, broken after his decease; provided the contract was not *personal* to the testator, in which case the contract was rescinded by the death, and the executors incur no responsibility. 2 Wms. Exors. 10th ed. 1346, 1349; *Siboni v. Kirkman*, 1 M. & W. 418, 423, *per* Parke, B.; *Beckham v. Drake*, 8 M. & W. 846, 852, *per* *Id.*; *Wentworth v. Cock*, 10 Ad. & E. 42, 45, *per* Patteson, J. And where partners have wrongfully received money, and one dies, his executor is liable, for the remedy is joint and several to restore the money taken. *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73, 117, 118, C. A.; *Ex pte. Adamson*, 8 Ch. D. 807, 815. *Vide ante*, p. 561. A contract for personal service is determined by the death of either party. *Farrow v. Wilson*, cited *ante*, p. 519. See also *Tasker v. Shepherd*, *ante*, p. 519, and *Phillips v. Alhambra Palace Co.*, (1901) 1 Q. B. 59. But the executors are responsible on such a contract for the breaches which occurred in the testator's lifetime. See *Stubbs v. Holywell Ry. Co.*, L. R., 2 Ex. 311, 313. As to liability for the breach, by the testator, of his contract to marry, see *Finlay v. Chirney*, 20 Q. B. D. 494, C. A., *ante*, p. 495. The executor of a deceased partner cannot be sued for the price of goods sold and delivered, where the delivery does not take place till after his death. *Bagel v. Miller*, (1903) 2 K. B. 212. As to revocation of authority by death, *vide post*, p. 1165. As to the liability of executors on a joint partnership debt, *vide ante*, p. 561.

With regard to torts, the maxim *Actio personalis moritur cum personâ*, in general applies, and the executors cannot be sued, either on legal; 1 Wms. Saund. 216, *a.* (1); or on equitable principles; *Peck v. Gurney*, L. R., 6 H. L. 377, 395; *Kirk v. Todd*, 21 Ch. D. 484, C. A.; *In re Duncan*, (1899) 1 Ch. 387; *Phillips v. Homfray*, 24 Ch. D. 439, C. A.; unless, by the tort, property or its proceeds or value have been appropriated by the deceased and added to his estate, in which case his executors are liable *pro tanto*; S. C.; *Peck v. Gurney*, L. R., 6 H. L. 393; *Ashley v. Taylor*, 10 Ch. D. 768; and also for interest in addition, see *Phillips v. Homfray*, (1892) 1 Ch. 465, C. A.; but not under 3 & 4 W. 4, c. 42, s. 29, *ante*, p. 625. S. C. As to whether an action lies under the Directors' Liability Act, 1890, s. 3, *ante*, p. 846, against the executor of a deceased director, see *Frankenberg v. Gt. Horseless Carriage Co.*, (1900) 1 Q. B. 504, C. A., and *Shepherd v. Bray*, *post*, p. 1155. An action

will lie where a relation existed between the parties involving a duty by the deceased, and payment to him by the plaintiff, as in the case of a carrier who failed to carry safely. 1 Wms. Saund. 217, *a*, (*d*); 2 Wms. Exors., 10th ed. 1355. See also *Baltheyany v. Watford*, 36 Ch. D. 269, C. A.; *Blackmore v. White*, (1899) 1 Q. B. 293; *Concha v. Murrietta*, 40 Ch. D. 543, C. A. A trustee is entitled to contribution from the estate of his deceased co-trustee in respect of liability for a joint breach of trust in making an unauthorized investment. *Ramskill v. Edcards*, 31 Ch. D. 100; *Jackson v. Dickinson*, (1903) 1 Ch. 947; and so is a director, from the estate of a deceased co-director, under the Directors' Liability Act, 1890, s. 5, *ante*, p. 846. *Shepherd v. Bray*, (1906) 2 Ch. 235.

By 3 & 4 W. 4, c. 42, s. 2, "An action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another, in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person, and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person." See on this section, *Richmond v. Nicholson*, 8 Scott, 134; *Powell v. Rees*, 7 Ad. & E. 426; *Morgan v. Ravey*, 6 H. & N. 265; 30 L. J., Ex. 131; *Woodhouse v. Walker*, 5 Q. B. D. 404; *Kirk v. Todd*, *ante*, p. 1154; *Jenks v. Clifden*, 11., (1897) 1 Ch. 694.

By the custom of England (extended to Wales by stat. 27 H. 8, c. 26, *Banbury v. Hewson*, 3 Exch. 558), the executors of the deceased incumbent of an ecclesiastical living were liable to his successor for dilapidations. Under the Ecclesiastical Dilapidations Act, 1871 (34 & 35 V. c. 43), ss. 29—35, these dilapidations are valued, and by sect. 36, the amount is a debt due from the executors. Such debt ranks as a simple contract debt. *In re Monk*, 35 Ch. D. 583.

It may be observed that a creditor may now sue the residuary legatee, who has all the estate of the deceased, without making the executor a party to the action. *Hunter v. Young*, 4 Ex. D. 256, C. A.

There is privity of estate between an executor or administrator and a subsequent administrator *de bonis non*, and the liabilities of the estate pass with the benefits of it, to the administrator *de bonis non*. *In re Watson*, 53 L. J., Ch. 305, Pearson, J. But the estate is not liable for services rendered while there is no personal representative, although they have been for the benefit of the estate, unless they have been rendered under a contract with the person A., who has obtained letters of administration and ratified the contract. *In re Watson*, 18 Q. B. D. 116; 19 *Id.* 234, C. A. And *quære*, whether A. can, as administrator, ratify a contract entered into before his appointment, even although with himself? *Id.* 234, *per* Ld. Esher, M.R.

There is no rule of law that a plaintiff cannot recover on his uncorroborated evidence in support of a claim against the estate of the deceased. *In re Garnett*, 31 Ch. D. 1, C. A.; *In re Hodgson*, *Id.* 177, C. A.; *Rawlinson v. Scholes*, 79 L. T. 350, M. Sitt., 1898, Q. B. D. Though in the absence of such corroboration the evidence is regarded with suspicion. S. C. C.

How executors, &c., are to be sued.] On causes of action arising before the testator's death, an executor is of course only liable as such, but with respect to contracts entered into by him after the testator's death, it seems that he can be sued, as executor, only on accounts stated by him as such executor, and where the demand arises in consequence of a contract made with the testator, for money paid for him as such executor at his request; *Farhall v.*

Farhall, L. R., 7 Ch. 123; 2 Wms. Exors. 10th ed. 1412 *et seq.*; so the executor is liable for interest only if the debt be foreborne at the *testator's* request. *Bignell v. Harpur*, 4 Exch. 773. The rule as to joinder of claims against an executor or administrator, in his representative capacity, with those against him personally, is now regulated by Rules, 1883, O. xviii. r. 5, *ante*, p. 1150. Claims charging an executor as such, when he can only be personally liable, are construed against him personally, the words "as executor" being rejected as surplusage. *Corner v. Shew*, 3 M. & W. 350, 356; 2 Wms. Exors., 10th ed. 1414, 1415.

With regard to funeral expenses, it seems that an executor, having received assets, will, to the extent of such assets, be liable for reasonable expenses in his personal capacity only, although he did not actually order the funeral. See *Corner v. Shew*, 3 M. & W. 350, 355, 356; *Magennis v. Dempsey*, L. R., 3 C. L. 327, C. P.; provided that credit was not given to another. *Brice v. Wilson*, 8 Ad. & E. 350, n., *per* Patteson, J. The allegation that he is executor is but surplusage. 2 Wms. Exors., 10th ed. 1429. If the executor have personally ordered the funeral, he will of course be liable, whether he have assets or not. *Brice v. Wilson*, 8 Ad. & E. 349, n. As to the right of a person necessarily paying for the funeral, to be recouped by the person bound to bury the deceased, *vide ante*, p. 597. As to the liability of the separate estate of a deceased married woman, for her funeral expenses, see *Hodgson v. Williamson*, 15 Ch. D. 87, and *In re McMyn*, 33 Ch. D. 575. As to a husband's liability under the Married Women's Property Act, 1882, s. 23, for the debts of his deceased wife, see *Surman v. Wharton*, *post*, p. 1179.

It should be observed, with regard to the personal liability of an executor, that the Stat. of Frauds (29 C. 2, c. 3), s. 4, enacts that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. On the construction of this section, *vide ante*, pp. 312 *et seq.* The cases decided on this division of the section are collected in Chit. Stat. 3rd ed. vol. ii. 149, 150; 5th ed. vol. iv. tit. *Frauds*.

Actions for a legacy.] An action at law could not be maintained for the distributive share of an intestate's property against the administrator, nor against his executor, although he may have expressly promised to pay. *Jones v. Tunner*, 7 B. & C. 542; 2 Wms. Exors. 10th ed. 1566. The remedy for recovering such a share, or a general legacy was and still is by an action or other proceeding to administer the estate of the deceased; see *Deeks v. Strutt*, 5 T. R. 690; and Rules, 1883, O. lv. r. 3. But, where the executor has rendered an account to the legatee, in which he debits himself for the amount, "as retained for the legatee," the latter may recover on an account stated. *Hart v. Minors*, 2 Cr. & M. 700. So, trover will lie for a specific legacy after assent by the defendant. *Williams v. Lee*, 3 Atk. 223. And, assent to a life interest in a chattel, enures as an assent to a further bequest in remainder; but, where the executor himself has such life interest bequeathed to him, his taking possession shall be presumed to be as executor, and not as legatee, if assenting to the legacy would be a *devastavit*. *Richards v. Browne*, 3 N. C. 493. The assent is matter of fact, and not law. *Mason v. Farnell*, 12 M. & W. 674. The assent by an executor who died before taking probate, is good against the administrator *cum test. annexo*. *Johnson v. Warwick*, 17 C. B. 516; 25 L. J., C. P. 102. See further as to assent, *ante*, p. 1055.

A legacy, or a distributive share under an intestacy, not exceeding 100*l.*, may be sued for in the county court; 51 & 52 V. c. 43, s. 58; 3 E. 7. c. 42, s. 3.

As to proof of payment of a legacy, *vide ante*, p. 272.

Denial that defendant is executor or administrator.] If the defendant intend to deny that he is executor or administrator, he must deny it specially. The proof of the issue on this defence lies upon the plaintiff, and he may support it, either by the primary evidence pointed out *ante*, pp. 118, 203, or, by secondary evidence after a notice to produce the probate, *ante*, pp. 15, 116, 117, and the presumption is that the probate or letters are in the possession of the party who is alone entitled to them.

The defendant is not liable if he has merely been appointed executor by the will and has not taken out probate, nor intermeddled with the testator's estate. *Douglas v. Forrest*, 4 Bing. 686; *Hudjair v. Pitchey*, (1894) A. C. 437, J. C. In fact, the probate is the proper evidence that he is executor. *Vide supra*. But upon this defence it is also sufficient to show such circumstances as would make the defendant executor *de son tort*. What acts will make a man an executor *de son tort* is a question of law, but it is for the jury to say whether the acts are proved. *Pudget v. Priest*, *infra*. Evidence of slight acts of intermeddling with the property of the deceased will be sufficient. In one case merely taking a book, and in another a bedstead, was held sufficient. *Anon.*, Noy, 69; *Parsons v. Mayesden*, Freem. 151. So, living in the house and carrying on the trade of the deceased; *Hooper v. Summersett*, Wightw. 16; suing for, receiving, or releasing the debts due to the estate; Com. Dig. Admor. (C. 1); entering on a lease or term for years; Bac. Ab. Exors. (B. 3); pleading any other defence than *ne unques executor* to an action brought against him as executor, will be evidence to prove the party an executor *de son tort*. *Id.* So, where A., the servant of B., sold goods of C., an intestate, both before and after C.'s death, in pursuance for orders given by C. in his lifetime, and paid the money arising from such sale into the hands of B., it was held that B. was an executor *de son tort*. *Pudget v. Priest*, 2 T. R. 97. And, where a creditor took an absolute bill of sale of the goods of his debtor, but agreed to leave them in his possession for a limited time, before the expiration of which time the debtor died, and the creditor took and sold the goods, it was held that the bill of sale was fraudulent against the other creditors, and that he had thereby rendered himself executor *de son tort*. *Edwards v. Harben*, *Id.* 587. See *In re Moldat*, (1899) 1 Ch. 831. A person who deals with a lease granted to the deceased, is chargeable as assignee of the term; see *Williams v. Heales*, L. R., 9 C. P. 177. A company becomes an executor *de son tort* by altering the name of a deceased shareholder on its register, before administration has been taken out to his estate. *New York Breweries Co. v. A.-G.*, (1899) A. C. 62, D. P. Locking up the goods of the deceased; directing the funeral in a manner suitable to the estate, and out of the effects of the deceased; feeding his cattle; repairing his houses, or providing necessaries for his children, will not render the person liable as an executor *de son tort*, for they are merely offices of kindness and charity. 1 Wms. Exors., 10th ed., pp. 187, 188. Where the widow of a hairdresser continued in the house and shop after his death without selling anything, and gave a promissory note to a creditor of her husband, and afterwards took out administration: held that, on this evidence alone she could not be charged as executrix *de son tort*. *Serle v. Waterworth*, 4 M. & W. 9.

In answer to the evidence adduced to prove him executor *de son tort*, the defendant may show that he took possession of the intestate's goods under a fair claim of right; *Femings v. Jarrat*, 1 Esp. 335; Com. Dig. Admor. (C. 2); or, that he acted under the authority of the rightful executor; *Sykes v. Sykes*,

L. R., 5 C. P. 113; or, of a person to whom administration was afterwards granted; *Hill v. Curtis*, L. R., 1 Eq. 90; but it is no defence that he acted as the agent of an executor, who never proved the will. *Cottle v. Aldrich*, 4 M. & S. 175; see also *New York Breweries Co., v. A.-G.*, *ante*, p. 1157. It seems that where there is a lawful executor in being, who has acted, there cannot be an executor *de son tort*; *Hall v. Elliott*, Peake, 87; *Read's case*, 5 Rep. 34 a; unless the latter claim or act as an executor, S. C.; *In re Lovett*, 3 Ch. D. 198. And there can be no executor *de son tort*, by merely taking from and under such a tortious executor. *Paull v. Simpson*, 9 Q. B. 365; *Hill v. Curtis*, *supra*. But, it seems that an agent who collects assets for an executor *de son tort*, knowing him to be such, makes himself accountable to the rightful executor, though he have already accounted to his principal. *Sharland v. Milton*, 5 Hare, 469. The executor *de son tort* of a rightful executor, is liable in the same manner as a rightful executor, for the debt of an original testator. *Meyrick v. Anderson*, 14 Q. B. 719.

Evidence on plene administravit—proof of assets.] Where the defendant pleads *plene administravit*, and the plaintiff replies that the defendant had assets, the issue lies upon the plaintiff, who must prove assets existing at the time of the writ sued out. *Mara v. Quin*, 6 T. R. 10. If the assets came to the hands of the defendants *after* the writ sued out, the plaintiff should reply that fact specially, and will not be allowed to give it in evidence under a reply taking issue only. *Id.* 11. Proof that certain articles of furniture were bought by the deceased and seen in his house shortly before his death is *primâ facie* evidence of assets. *Britton v. Jones*, 3 N. C. 676; *Stroud v. Dandridge*, 1 Car. & K. 445. In order to prove assets, the plaintiff may give in evidence the inventory exhibited by the defendant in the court granting probate. But, a copy of the inventory signed by the appraisers, and not by the executors, is not evidence; B. N. P. 140. Where the defendant has not distinguished the sperate from the desperate debts in the inventory, it has been held that the whole shall *primâ facie* be taken to be assets, so as to throw the onus of proving some of them desperate upon the defendant. *Id.*, *Smith v. Davis*, 1 Selw. N. P., 13th ed. 707. But Ld. Ellenborough ruled that it was necessary to prove, presumptively at least, that the debts have been paid. *Giles v. Dyson*, 1 Stark. 32. It is not every inventory that will be proof of assets. Thus, the inventory exhibited by an executor before probate, in which he was bound to include all the effects of the testator without deductions, is not even *primâ facie* evidence of assets. *Stearn v. Mills*, 4 B. & Ad. 657. The probate stamp has been held to be *primâ facie* evidence that the executor, has assets to the amonnt covered by the stamp. *Foster v. Blakelock*, 5 B. & C. 328. This case was, however, doubted in *Stearn v. Mills*, *supra*. In *Mann v. Lang*, 3 Ad. & E. 699, the court were of opinion that such stamp was admissible evidence for the plaintiff; but were not agreed whether it was *primâ facie* evidence of the *amount* of assets. See further *Lazonby v. Rawson*, 4 D. M. & G. 556. Under the stat. 44 & 45 V. c. 12, s. 28, the affidavit of the deceased's estate, made by the executor for the purpose of obtaining probate, and on which the estate duty is now paid (see sect. 27), may contain a schedule of debts and funeral expenses, and duty is payable (*vide ante*, p. 270), in respect of the balance only. The probate now states the gross amount at which the estate is sworn. *Id.* sect. 30, *ante*, p. 270. Where, to prove assets, an account rendered by the defendants to the plaintiff was given in evidence, in which they stated that a sum of money had been awarded as due to the testator's estate, Ld. Ellenborough held that this was not sufficient without showing that it had been received by the executors. *Williams v. Innes*, 1 Camp. 364. If an executor submit to arbitration, it is not an

admission of assets; the arbitrators not directing the executor to pay the money. *Pearson v. Henry*, 5 T. R. 6. But a submission to arbitration, and an agreement to pay what shall be awarded, with an award to pay accordingly, is an admission of assets to the amount of the sum so awarded. *Burry v. Rush*, 1 T. R. 691; *Worthington v. Barlow*, 7 T. R. 453, and *quære?* if not conclusive. Proof of an admission by an executor that the debt was just, and that it should be paid as soon as he could, is not evidence to charge him with assets. *Hindsley v. Russell*, 12 East, 232. So the payment of interest upon a bond of the testator is not an admission of assets. *Clerkeley v. Brett*, cited 5 T. R. 8. An administrator *bonâ fide* compounding with a debtor to the estate, is not liable to the full amount of the debt compounded, as he is where he releases it without consideration. *Pennington v. Healey*, 1 Cr. & M. 402. As to admissions by executor before probate, *vide ante*, p. 68.

Where leasehold premises are the assets, the value as between the lessor and the lessee's executor is to be taken exclusive of deterioration for want of repair, or other breach of covenant committed in the executor's time; and the insolvency of an under-tenant, let in by the testator, cannot be taken into consideration, at least where there is a clause of re-entry in the under-lease for non-payment of rent. *Hornidge v. Wilson*, 11 Ad. & E. 645. In the above case the action was for rent against the executor, as assignee of the testator. In an action for rent against executor as assignee of the lessee, under a lease at the rent of 90*l.*, where the defendant pleaded that he entered only as executor; that the premises *had not yielded any profit*; and that he ought to be charged only as executor, and had no assets; the defendant is only liable for rent at the rate at which the premises could be let. *Hopwood v. Whaley*, 6 C. B. 744; *In re Bowes*, 37 Ch. D. 128. So where the defendant was sued as assignee of a lease of premises, a plea that administration *de bonis non* of the lessee was granted to S., whom he afterwards married, and that neither he nor his wife entered into possession after the grant, was held good, as it showed that the defendant could only be liable in a representative character, and that he had never taken possession. *Kearsley v. Oxley*, 2 H. & C. 896.

Assets mean legal, and not equitable assets. See *Lowe v. Peskett*, 16 C. B. 500; 24 L. J., C. P. 196; *Cook v. Gregson*, 3 Drew. 547; 25 L. J., Ch. 706. As to the distinction between legal and equitable assets, *vide* S. C., and 2 Wms. Exors., pt. iv. bk. i.

By the Land Transfer Act, 1897 (60 & 61 V. c. 65), ss. 1, 2, *vide ante*, p. 1036, in the case of a person dying after Dec. 31st, 1897, his freehold estate vests in his personal representative, R., as if it were a chattel real, notwithstanding any devise thereof, and it is to be administered by R. accordingly: hence such estate will be assets in the hands of R. Sect. 2 (3), however "provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liabilities of real estate to be charged with the payment of legacies."

According to the rule of equity, which now prevails at law, an executor is not liable for assets which he has received and afterwards lost, without wilful default. *Job v. Job*, 6 Ch. D. 562.

On a defence by several executors that they have fully administered, if some appear to have assets in their hands, and the others not, the latter are entitled to a verdict, although they join in the defence. *Parsons v. Hancock*, M. & M. 330, Parke, J. See 2 Wms. Exors., 10th ed. 1596.

Evidence on plene administravit in answer to proof of assets—Payment of debts.] When the plaintiff has given evidence of assets, the defendant, in answer to such evidence, may prove that those assets have been exhausted by payment of other debts of the deceased of as high, or of higher, degree

than the debt of the plaintiff, provided such payments were made before the writ. And the defendant may prove payment of lower debts before notice of the plaintiff's debt of a higher degree. 2 Wms. Exors., 10th ed. 1592. So, payment of simple contract debts before a breach of covenant had been committed, was a defence; as in an action by the executor of the lessee against the executor of the assignee of a lease on a covenant to indemnify against breaches of covenant to repair, the breach having been committed after the lease had been sold and assigned by the defendant. *Collins v. Crouch*, 13 Q. B. 542; *Read v. Blunt*, 5 Sim. 567. But, where the covenant was for payment of rent, and the executor, being in possession, has derived any profit from the lease, such profits must, it is said, be retained as assets in payment of rent. *Semb. per Cur.* in *Collins v. Crouch*, *supra*. Now, however, see 32 & 33 V. c. 46, *post*, p. 1161.

The stat. 22 & 23 V. c. 35, contains important provisions for the protection of executors and administrators. By sects. 27, 28, an executor, &c., is enabled to set apart a fund for dormant or contingent claims under leases and other conveyances of land, and then, after assigning the lease, &c., to distribute the residue without incurring liability. By sect. 29, an executor, &c., is enabled to advertise notices, requiring persons having claims, against or on the estate to send them in by a given day, and then incurs no liability in distributing the residue after satisfying the claims of which he has notice at the time of distribution. An executor acting under this section has the same protection as if he had administered the estate under an administration decree; *Clegg v. Rowland*, L. R., 3 Eq. 368; and such administration is an absolute indemnity to an executor. *Williams v. Headland*, 4 Giff. 505. It extends to real estate administered by him under 60 & 61 V. c. 65 ss. 2 (3), *ante*, p. 1159. *Cary & Lott's Contract*, (1901) 2 Ch. 463. And to claims by next of kin. *Newton v. Sherry*, 1 C. P. D. 246. As to sufficiency of notice, see *In re Bracken*, 43 Ch. D. 1, C. A.

By the Trustee Act, 1893 (56 & 57 V. c. 53), s. 23, an executor, &c., doing any act *bonâ fide*, or making a payment under a power of attorney, is not liable for the act so done or money so paid, by reason of the revocation of the power by death or otherwise, without notice to the executor.

The course of distribution was formerly as follows :—

1. All funeral expenses, and the charges of proving the will, or of taking out letters of administration; and the defendant may show that he has retained money in his hands to pay for the expenses of administration to which he has made himself liable, without proving that he has paid them. *Gillies v. Smither*, 2 Stark. 528.

2. Debts due to the Crown by record or speciality. See *In re Ld. Churchill*, 39 Ch. D. 174.

3. Certain debts created by particular statutes, *vide post*, p. 1161.

4. Debts of record, if registered according to 2 & 3 V. c. 11, and re-registered within 5 years of the testator's death, if 5 years from the original registration have then elapsed; otherwise they only rank as simple contract debts; 23 & 24 V. c. 38, ss. 3, 4, *vide infra*.

5. Recognizances at common law; and the now obsolete securities of statute merchant and statute staple.

6. Debts due by speciality; and rent whether reserved by parol or by deed; *vide Merger*, *ante*, p. 693. This is now altered by 32 & 33 V. c. 46, *post*, p. 1161.

7. Judgment against executor though unregistered, for 23 & 24 V. c. 38, *supra*, does not apply. *Jennings v. Rigby*, 33 Beav. 198; 33 L. J., Ch. 149.

8. Debts due by simple contract, and damages payable by executors under 3 & 4 W. 4, c. 42, s. 2, *ante*, p. 1155, to the Crown first, and secondly to a subject; Com. Dig. Admon. (C. 2); unregistered debts of record, *vide supra*.

9. Damages for dilapidations payable by the executors of the incumbent of an ecclesiastical benefice; *Bryan v. Clay*, 1 E. & B. 38; 22 L. J., Q. B. 23. Now altered by 34 & 35 V. c. 43, ss. 29—36, *ante*, p. 1155.

10. Legacies.

By stat. 63 & 64 V. c. 26, s. 5 the registration of debts of record and judgments under 2 & 3 V. c. 11 & 23 & 24 V. c. 38, ss. 3, 4, ceased as from July 1st, 1901, and the registration introduced by 63 & 64 V. c. 26, ss. 2, 3, *vide ante*, p. 1060, affects such debts, so far only as relates to their being charges on land. It seems however that that statute is not retro-active so far as relates to debts registered prior to that date. See the Interpretation Act, 1889, 52 & 53 V. c. 63, s. 38 (2).

This order of distribution is not affected by stat. 60 & 61 V. c. 65, ss. 1, 2 *vide s. 2 (3), ante*, p. 1159. The order is still important to determine the validity of a preferential payment (*post*, p. 1164), or retainer (*post*, p. 1163) made by the executor, although by Hinde Palmer's Act (32 & 33 V. c. 46), specialty debts are deprived of priority over simple contract debts, and they are both payable *pari passu* out of the assets, whether legal or equitable, without prejudice to any lien, charge or other security which any creditor may have for his debt. This act postpones a specialty debt to an unregistered judgment obtained against an executor on a simple contract debt; *In re Williams' Estate*, L. R., 15 Eq. 270; *Smith v. Morgan*, 5 C. P. D. 337; and deprives rent of priority over simple contract debts. *In re Hastings*, 6 Ch. D. 610. It does not prevent a simple contract debt from being paid in preference to a specialty debt. *In re Samson*, (1906) 2 Ch. 584, C. A. It seems not to postpone a specialty debt to a simple contract Crown debt. *In re Bentinck*, (1897) 1 Ch. 673. As to the effect of 47 & 48 V. c. 71 on Crown debts, see S. C., *Id.* p. 675.

By the Regimental Debts Act, 1893 (56 & 57 V. c. 5), s. 2, certain debts are preferential charges in the case of persons dying while subject to military law. So by the Preferential Payments in Bankruptcy Act, 1888, 51 & 52 V. c. 62, ss. 1, 3, and 6 E. 7. c. 58, s. 5 (3), debts for certain rates, taxes, wages, and compensation, have priority where an order has been made for the administration of the estate, as in bankruptcy, *vide post*, p. 1162.

The expenses of the funeral, if reasonable, and suited to the rank and circumstances of the deceased, will be allowed out of the assets; if unreasonable, the executor must take his chance of the estate turning out solvent. *Edwards v. Edwards*, 2 Cr. & M. 612; and *vide ante*, p. 1156. Estate duty now payable in respect of real estate is not a testamentary expense which the executor is bound to pay out of the personal estate. *In re Sharman*, (1901) 2 Ch. 280.

The liquidator of a company who has obtained a balance order against the executor of a deceased contributory under the Companies Act, 1862, s. 103, does not thereby obtain any priority in administration. *In re Hubback*, 29 Ch. D. 934, C. A.

Payment by the defendant of debts to the amount after the suing out, and with notice of, the plaintiff's writ, is now a good defence. *In re Radcliff*, 7 Ch. D. 733; *Vibart v. Coles*, 24 Q. B. D. 364, C. A. But it must be pleaded specially. Dyer, 32 a (margin); Com. Dig. Admon. (C. 2.) An executor *de son tort* may pay a higher debt after action brought by a simple contract creditor, and may plead the payment of that debt in bar of the action. *Oxenham v. Clapp*, 2 B. & Ad. 309.

Where the action is brought on a bond of the deceased, and the defendant pleads *plene administravit*, and relies upon the payment of other bonds of the deceased, the execution of such bonds must be duly proved, even though they have been destroyed. *Gillies v. Smither*, 2 Stark. 530. See also *Poole v. Warren*, 8 Ad. & E. 582. As to the proof of bonds, *vide ante*, pp. 132 *et seq.*

So, where the defendant, being sued on a simple contract, pleads *plene administravit*, and relies upon the payment of other simple contract debts, he must prove the debt as well as the payment. B. N. P. 143.

Where defendant shows payment of debts, &c., plaintiff may show that the payment was made out of another fund applicable to such debts, and not out of the assets. *Marston v. Downes*, 1 Ad. & E. 31. In debt on bond, to which defendant pleaded *plene administravit* before notice, it was held, that if the defendant had invested the residue in the funds in his own name, although for the benefit of the legatees to whom he had paid the dividends for many years, he was still liable as for assets in hand; and it was questioned whether payment of legacies before notice could be proved under the plea of *plene administravit*. *Smith v. Day*, 2 M. & W. 684.

The executor may pay debts, though barred by the Statute of Limitations; *Louis v. Rumney*, L. R., 4 Eq. 451; and seems not to be bound to plead the statute to an action. *Williamson v. Naylor*, 3 Y. & C. 211 (a). In *McCulloch v. Dawes*, 9 D. & Ry. 43, Bayley, J., expressed a contrary opinion; but this dictum was dissented from by Wood, V.-C., in *Hill v. Walker*, *post*, p. 1163.

Though a creditor may, by misleading a creditor, preclude himself from objecting to the payment of a legacy before a debt, yet a letter written by him to the executor intimating an intention to hold him liable personally, and not as executor, is insufficient for this purpose. *Richards v. Browne*, 3 N. C. 493; see *Jewsbury v. Mummery*, L. R., 8 C. P. 56, Ex. Ch.; *In re Birch*, 27 Ch. D. 622.

The right of the executor to prefer a creditor is not affected by an order for an account made under Rules, 1883, O. xv. *In re Barrett*, 43 Ch. D. 70. See further, *post*, p. 1163.

[*Administration of insolvent deceased's estates.*] The J. Act, 1875, s. 10, *ante*, p. 308, provides that in the case of the administration by the court, of the insolvent estate of a person dying after Nov. 1st, 1875, the same rules shall prevail as to the respective rights of secured and unsecured debtors, as to debts and liabilities provable, and as to valuation of annuities and future or contingent liabilities respectively, as may for the time be in force under the bankruptcy law with respect to bankrupt's estate. As to the proof of claims in bankruptcy, see Bankruptcy Act, 1883, s. 37, and Sched. II.

Under the J. Act, 1875, s. 10, *supra*, voluntary creditors are in such cases now to be paid *pari passu* with creditors for value. *In re Whitaker*, (1901) 1 Ch. 9, and judgment with simple contract creditors: see S. C. And statutory preferences given in bankruptcy are applied, *e.g.* those given by 51 & 52 V. c. 62, ss. 1 (1) (6), 3, and 6 E. 7. c. 58, s. 5 (3). *In re Leng*, (1895), 1 Ch. 652, C. A.; *In re Heywood*, (1897) 2 Ch. 593. See also *In re Ambler*, (1905) 1 Ch. 697. Sect. 10 does not however enlarge the assets by introducing the doctrine of reputed ownership (Bky. Act, 1883, s. 14 (iii.)); *Gorringe v. Irwell India Rubber, &c. Works*, 34 Ch. D. 128, C. A.; *In re Withernsea Brickworks*, 16 Ch. D. 341, *per James*, L.J.; or, of fraudulent preferences, S. C., *per Id.*; or, the provisions affecting executions: S. C.; *Pratt v. Inman*, 43 Ch. D. 175; *Hasluck v. Clark*, (1899) 1 Q. B. 699, C. A.; or, voluntary settlements; *In re Gould*, 19 Q. B. D. 92, C. A.; or, distress for rent; *Thomas v. Patent Lionite Co.*, 17 Ch. D. 250, C. A.; or the provisions of the Bills of Sale Act, 1878, s. 8, *post*, p. 1194; *In re Count D'Espineuil*, 20 Ch. D. 217. Nor, does it give the power of disclaimer, which trustees in bankruptcy have under the Bky. Act, 1883, s. 55. *In re Westbourne Grove Drapery Co.*, 5 Ch. D. 248.

The mutual credit provisions (Bky. Act, 1883, s. 38), however, apply; so that in an action by the executor, the defendant can set off unliquidated damages. See *Mersey Steel & Iron Co. v. Naylor*, 9 Q. B. D. 648, C. A.; 9 Ap. Ca. 434, D. P., *ante*, p. 1112. So, contingent debts becoming due

during the administration are provable under the principle of Bky. Act, 1883, s. 37. *In re Bridges*, 17 Ch. D. 342, following *Macfarlane's Claim*, *Id.* 337; *In re McMahon*, (1900) 1 Ch. 173. See further, as to set-off under this section, *ante*, pp. 1112, 1113. A creditor in respect of a debt bearing interest, is entitled only to interest to the date of the judgment for administration, which is equivalent to an order for adjudication. *Summers, In re*, 13 Ch. D. 136.

Evidence on plene administravit—retainer.] The defendant may either plead a retainer of a debt due to him (which must be a debt of an equal or higher degree than the debt for which the action is brought, in order to entitle the defendant to retain it) or may give it in evidence on the defence of *plene administravit*; 1 Wms. Saund. 333, (6); *Boyd v. Brooks*, 34 Beav. 7; affirm. 34 L. J., Ch. 605; see also *In re Marvin*, (1905) 2 Ch. 490. But if he have retained for his own debt without notice of the debt of higher degree the retainer is good. *In re Fludyer*, (1898) 2 Ch. 562. So, though his debt was barred by the Statute of Limitations. *Stahlschmidt v. Lett*, 1 Sm. & G. 415; *Hill v. Walker*, 4 K. & J. 166. But this is an exception to the rule that the executor can only retain for a debt which is enforceable by action; *In re Rowson*, 29 Ch. D. 362, 363, *per* C. A.; he cannot retain for a debt as to which the Stat. of Frauds, s. 4, affords a defence. S. C. The defendant may retain for payments which he has made out of his own moneys, before the issuing of the writ, in discharge of debts of the deceased of equal or higher degree than plaintiff's. Co. Litt. 283 a; B. N. P. 140 a. The J. Act, 1875, s. 10, *ante*, p. 308, does not interfere with the right of retainer. *Lee v. Nuttall*, 12 Ch. D. 61, C. A. Nor does the stat. 32 & 33 V. c. 46 (*ante*, p. 1161); *Crowder v. Stewart*, 16 Ch. D. 368; but, it does not enable the executor to retain his debt as against a creditor of higher degree than himself. *Wilson v. Coxwell*, 23 Ch. D. 764. The executor may retain on a claim for indemnity arising from a contract of suretyship entered into by him for his testator; *In re Giles*, (1896) 1 Ch. 956; or for damages for breach of a pecuniary contract for which there is a certain standard or measure, *e.g.*, for breach of a contract to assign a policy, or replace furniture. *In re Compton*, 30 Ch. D. 85, C. A., following *Loane v. Casey*, 2 W. Bl. 965. But not for damages in tort. S. C., *Id.* 967, *per* Blackstone, J. Where the debt due to the executor exceeds the assets, he may retain without realising them. *Ex pte. Gilbert*, (1898) 1 Q. B. 282. The right of retainer is not affected by an administration decree made at the suit of other creditors; *In re Belham*, (1901) 2 Ch. 52, C. A., nor by the mere fact of payments, by the executor, of the assets to the official receiver of the testator's estate. *In re Rhoades*, (1899) 2 Q. B. 347, C. A. The executor need not assert his right before occasion to do so arises, *e.g.*, some attempt to deprive him of the assets. S. C.

Where the defendant pleads a retainer, and also a judgment recovered, which together cover the assets, it is sufficient for the plaintiff to falsify either claim. *Campion v. Bentley*, 1 Esp. 344; see *Gilbert v. Dee*, Freem. 537. One of two executors may retain for his own debt out of a balance due from both to the estate. *Kent v. Pickering*, 2 Keene, 1. And one of three executors, who is also one of two joint creditors, can retain in respect of his joint debt. *Crowder v. Stewart*, *supra*; *In re Hubback*, 29 Ch. D. 934, C. A. An executor may retain for an equitable claim, as for a balance due on a partnership account. *In re Morris*, L. R., 10 Ch. 68. The right of a widow, executrix to her late husband, to retain for a debt due to her from his estate, is not affected by the Married Women's Property Act, 1882, 45 & 46 Vict. c. 75, s. 3. *In re Ambler*, (1905) 1 Ch. 697, C. A. See further as to retainer, *Cook v. Gregson*, 3 Drew. 547; 25 L. J. Ch. 796, and *Lowe v. Peshett*, 16 C. B. 500; 24 L. J., C. P. 196. There is no right of retainer out of

equitable assets. *Bain v. Sadler*, L. R., 12 Eq. 570; *Walters v. Walters*, 18 Ch. D. 182; 1 Wms. Exors. 10th ed. 790. Nor does the stat. 60 & 61 V. c. 65, *vide ante*, p. 1159, confer a right of retainer as against real estate. *In re Williams*, (1904) 1 Ch. 52. The earnings of a married woman are equitable assets on her decease, by the operation of the Married Women's Property Act, 1882, *post*, p. 1174. *In re Poole's Estate*, 6 Ch. D. 739.

An executor *de son tort* cannot retain for his own debt, though of higher degree, and though the rightful executor after action brought, has consented to the retainer. *Curtis v. Vernon*, 3 T. R. 587; on error, 2 H. Bl. 18. In answer to such evidence of retainer, the plaintiff may show who are the rightful executors. B. N. P. 143.

Evidence on a defence of outstanding debts or judgments and plene administravit præter—reply per fraudem.] The defendant cannot under the defence of *plene administravit*, give evidence of the existence of unpaid debts of a higher nature. B. N. P. 141. Such defence must be pleaded; *Id.*; 1 Wms. Saund. 333 (a), (8); and if the defendant plead a judgment obtained against him for 100*l.*, and that he has not goods except to the value of 5*l.*, and the plaintiff proves that he has 100*l.*, yet he gains nothing; for the substance of the issue is that the defendant has not above what will satisfy the judgment. *Moon v. Andrews*, Hob. 133; 1 Wm. Saund. 333 (7).

In the case of a bond debt, the penalty is the debt where the bond is forfeited; but where the bond is not due, the sum in the condition is the debt. 1 Wms. Saund. 333 a, (7).

Where the defendant pleads an outstanding judgment, the plaintiff may reply that it was obtained or kept on foot by fraud, and the plaintiff may either give in evidence that the debt was not a just one, or that less is due than the sum for which judgment has been given. 2 Wms. Saund. 50, (3). In answer to the latter evidence, which is *primâ facie* proof of fraud, the defendant may show that the judgment was entered for more than was due by mistake. *Pease v. Naylor*, 5 T. R. 80. If a judgment be pleaded, and *per fraudem* replied, upon which issue is taken, and it appear in evidence that the creditor was willing to take less than is recovered, it is a proof of fraud; but if it be shown that the administrator had not assets to pay that sum, it is no fraud; *per Cur.*, *Parker v. Atfield*, 1 Salk. 312. If the defendant plead several judgments recovered *against himself*, to which the plaintiff reply fraud, it will entitle the plaintiff to a general judgment if he can avoid any one of them; for a judgment recovered against an executor, being an admission of assets, if any one of the judgments be falsified, the defendant admits by his defence that he has more assets than will satisfy the other judgments by as much as the judgment, so falsified, amounts to. 1 Wms. Saund. 337 a, (1). See *Chamberlaine v. Pickering*, Freem. 28; *Gilbert v. Dee*, *Id.* 537. When the judgments or debts pleaded are upon penalties, the right way of replying is to say that the creditor would have accepted the less sums, but the defendant either would not pay, or had paid them, and kept the judgments or bonds on foot by fraud and covin; and the plaintiff, on issue joined thereon, may give in evidence such matter as will serve to avoid the penalties. If he reply, generally, that the judgments were for less sums, and that the defendant has assets above what will satisfy them, on the issue that he has not, the defendant has a right to insist on the *penalties* as the debts. 1 Wms. Saund. 334 (9).

An executor may confess a judgment to a creditor in equal degree with the plaintiff, pending the action, and plead it in bar; and, though done for the express purpose of depriving the plaintiff of his debt, it is good both at law and in equity. 2 Wms. Saund. 50 a, (3), and (a); *Pickstock v. Lyster*, 3 M. & S. 375.

Revocation of authority by death.] A. contracted with the plaintiff that he should endeavour to sell a picture belonging to A., and if he succeeded, A. should pay him 100*l.* A. died. The plaintiff endeavoured to sell the picture; and after A.'s death, succeeded in selling it, and brought an action against A.'s administratrix. The declaration set out these facts, and alleged that the defendant confirmed the sale as administratrix, and the plaintiff claimed the 100*l.* from the defendant as administratrix; held, that the declaration was bad; that the defendant was not liable as administratrix, or personally, for the 100*l.*, the original authority having been revoked by A.'s death. *Semble*, that the defendant might be liable personally to the plaintiff, after the confirmation of the sale, on a *quantum meruit*, as on a fresh employment by her to sell. *Campanari v. Woodburn*, 15 C. B. 400; 24 L. J., C. P. 13. Where the plaintiff went on supplying goods to the wife of the testator I. after his death by shipwreck, until the news of it arrived; the widow was held not to be liable for the price of these goods; *Smout v. Ilbery*, 10 M. & W. 1; nor were I.'s executors. *Blades v. Free*, 9 B. & C. 167. As to revocation of a guarantee by death of guarantor, *vide ante*, p. 482. As to the effect of the death of the principal, on a continuation account, opened for him by a broker on the Stock Exchange, *vide ante*, p. 592.

Set-off.] *Vide ante*, p. 1153.

Replevin—Aovury for rent.] As to right of executors to distrain for rent due to their testator, *vide ante*, p. 1080.

Evidence on defence of Statute of Limitations.] The statutes of limitation in personal actions will be found *ante*, pp. 678, 679, 719 *et seq.* The plaintiff cannot show a promise by the executor so as to take a case out of the statute, unless the claim lays a promise by him; and a mere acknowledgment of the existence of the debt is not sufficient; there must be an express promise; and, where there are several executors co-defendants, there must be a promise by all. *Tullock v. Dunn*, Ry. & M. 516. And now, by 9 G. 4, c. 14, s. 1, *ante*, p. 684, the promise must be in writing; but the plaintiff may recover against any one or more of the executors who has made such promise; but nothing in that act is to lessen the effect of any payment of principal or interest. The promise by one of several executors binds the estate. *In re Macdonald*, (1897) 2 Ch. 181. As to the dissent of a co-executor, see *Astbury v. Astbury*, (1898) 2 Ch. 111. See further as to admission by a co-executor, *For v. Waters*, 12 Ad. & E. 43, and other cases cited *ante*, p. 68. But the 19 & 20 V. c. 97, s. 14 (*ante*, p. 687), enacts that one executor shall not lose the benefit of the statute by the payment of a co-executor. See on the construction of this section, *In re Hollingshead*, 37 Ch. D. 651. After the statute has begun to run, it continues to run though the debtor dies within the six years, and an executor is not appointed until after the expiration of the six years. *Rhodes v. Smethurst*, 6 M. & W. 351. The statute runs notwithstanding the creditor has sent in a claim in answer to the executor's advertisement under 22 & 23 V. c. 35, s. 29, *ante*, p. 1160. *In re Stephens*, 43 Ch. D. 39. Where the cause of action has accrued after the death of the testator, the statute does not begin to run until the executor has taken upon himself the administration of the estate. *Douglas v. Forrest*, 4 Bing. 686. Where an action of debt brought within six years, abated by the defendant's death, and no administration was taken out till six years had elapsed, the statute did not run, provided a fresh action were brought within a reasonable time (*e.g.*, a year) after administration or probate taken out; *Curlewis v. Mornington*, *Et. of*, 7 E. & B. 283; 26 L. J., Q. B. 181; Ex. Ch., 27 L. J., Q. B. 439; so, in the case of an action on a bond brought within 20 years. *Sturgis v.*

Darell, 4 H. & N. 622; 28 L. J., Ex. 366; 6 H. & N. 120, Ex. Ch.; 29 L. J., Ex. 472. And this practice may still be followed; *Swindell v. Bulkeley*, 18 Q. B. D. 250, C. A.; although, as by Rules, 1883, O. xvii. r. 1, the action does not now in these cases abate by the death of the plaintiff or defendant, a fresh action is unnecessary. S. C., *Id.* 255, *per Lopes*, L.J. The claim against an executor, on the ground of a *devastavit*, committed by him, *vide infra*, is barred at the expiration of 6 years. *In re Gale*, 22 Ch. D. 820. But in a claim against him, as executor only, on a specialty debt, he cannot set up his own wrongful payments as a *devastavit*, in order to obtain the benefit of the statute. *In re Hyatt*, 38 Ch. D. 609.

The Trustee Act, 1888 (51 & 52 V. c. 59), s. 8 (3), provides that that section (cited *ante*, p. 680) "shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations."

[*Evidence in an action on a judgment suggesting a devastavit.*] The foundation of this action is the judgment obtained against the executor; see hereon 1 Wms. Saund. 219 *a, et seq.*, (8). If an executor or administrator, in an action brought against him as such, admit assets by his pleading, he will not, in an action of debt on the judgment suggesting a *devastavit*, be allowed to show that he has not assets; and it will be sufficient for the plaintiff, upon a denial of the *devastavit*, to prove the former judgment and the return of *nulla bona* to the *fi. fa.* *Erving v. Peters*, 3 T. R. 685; *Skelton v. Hawling*, 1 Wils. 259. See *In re Marvin*, (1905) 2 Ch. 490. So, where a defence of *plene administravit* is found against the executor in the former action, he is estopped from showing that the *devastavit* was committed with the plaintiff's consent. *Jewsbury v. Mummery*, L. R., 8 C. P. 56, Ex. Ch. Where the defendant confessed assets 380*l.*, and gave a cheque for the amount on a banker who refused to pay it without the assent of other co-executors; held that this was no answer; for the defendant was estopped by admitting assets at his disposal; and *semb.*, he ought to have pleaded assets specially, so as to show that he had them only jointly with the co-executors; or have denied assets altogether if he had no power over them. *Cooper v. Taylor*, 6 M. & Gr. 989.

Defences denying the execution of the bond by the testator, or the making by him of the alleged contract, or alleging a release to the testator, or payment by him, admit assets. 1 Wms. Saund. 335, (10). So, a judgment for the plaintiff on objection to the defence in point of law, or by default, will be evidence of assets; *Rock v. Leighton*, 1 Salk. 310; though no *devastavit* has been returned by the sheriff. *Leonard v. Simpson*, 2 N. C. 176; see also *Pulmer v. Waller*, 1 M. & W. 689. Where the plea denied the wasting, evidence of a judgment for the plaintiff in a court baron on a plea of no assets, and *nulla bona* returned to a *fi. fa.* in that court, was held conclusive against the defendant without replying the estoppel. *Dawson v. Gregory*, 7 Q. B. 756. The *devastavit* of one of several executors does not affect the others who took no part in the receipt of the assets. *Pemberton v. Chapman*, 7 E. & B. 219; 26 L. J., Q. B. 117. A married woman who has proved a will as executrix, was, after her husband's death, liable for a *devastavit* committed by him. *Soady v. Turnbull*, L. R., 1 Ch. 494. But now see the Married Women's Property Act, 1882, ss. 1 (2), 18, 24, *post*, pp. 1175, 1176.

An executor was not, at common law, liable for a *devastavit* by his testator or intestate, but this has been remedied by 30 C. 2, c. 7; enlarged by 4 W. & M. c. 24, s. 12. The effect of these statutes is, that whatever act of the executor, or of an executor *de son tort*, would have made him personally liable and chargeable with the payment of the demand *de bonis propriis*, will now make his personal estate liable in the hands of his executor or administrator.

1 Wms. Saund. 219 *d*, (8); 2 Wms. Exors. 10th ed. 1605; *Coward v. Gregory*, L. R., 2 C. P. 153. But the executor of an executrix *de son tort* is not liable for breach of contract committed by the person with whose property the executrix has intermeddled. *Wilson v. Hodson*, L. R., 7 Ex. 84.

As to the Statute of Limitations, *vide ante*, p. 1165.

ACTIONS AGAINST HEIRS AND DEVISEES.

An action of debt on the specialty of the ancestor lies, at common law, against the heir, if named in the deed. Co. Lit. 209 a: 383 b, 384 b. And under the 11 G. 4 & 1 W. 4, c. 47, ss. 2, 3, repealing and replacing the Stat. of Fraudulent Devises (3 W. & M. c. 14), it lies against the devisee also, on a specialty in which the heir is named. By the Conveyancing, &c. Act, 1881 (44 & 45 V. c. 11), ss. 58, 59, a covenant made after Dec. 31st, 1881, binds the heir though not named.

Under the Land Transfer Act, 1897 (60 & 61 V. c. 65), ss. 1, 2, *vide ante*, p. 1036, in the case of a person dying after Dec. 31st, 1897, his freehold estate vests in his personal representative R., as if it were a chattel real, notwithstanding any devise thereof, and is to be administered by R. accordingly. The heir takes only by conveyance from R., and the devisee, on R.'s assent, to the devise, see sect. 3, *ante*, pp. 1036, 1055, 1061. As such estate is now, under *Id.* sect. 2, an asset in R.'s hands to be administered by him, it is improbable that resort will often be had to this form of action.

The evidence in actions against an heir, or heir and devisee jointly, or the devisee alone, depends on the defence and issue. Besides the other defences pleadable in an action on a bond or covenant, &c., the defendant may deny that he is heir, or may plead that he has nothing by descent or by devise.

Evidence of heirship.] *Vide ante*, pp. 1036 *et seq.* In the case of an ancestor dying after Dec. 31st, 1897, the conveyance by the personal representative under 60 & 61 V. c. 65, s. 3 must be proved, *vide ante*, p. 1061; as to the proof thereof, *vide ante*, p. 132.

Evidence on defence of riens per descent.] The law of inheritance has undergone a material change by 3 & 4 W. 4, c. 106, partly recited *ante*, p. 1036. It must be borne in mind that the following cases were decided before the passing of that act.

Upon issue joined on the defence of *riens per descent*, the plaintiff must prove the assets by descent. B. N. P. 175. The seisin of the ancestor may be proved by showing that he was in possession of the lands, or in the receipt of the rents and profits. *Vide ante*, pp. 53, 54, 1037.

The defendant may plead payment of another bond creditor to the value of the land descended. *Buckley v. Nightingale*, Stra. 665. So he may prove a bond to the Crown by his ancestor, and an extent thereon to the amount of the assets; but proof of the extent alone is not sufficient. *Sherwood v. Adderley*, 1 *Id.* Raym. 734.

Evidence on defence of riens per devise or descent—What are assets.] By 3 & 4 W. 4, c. 106, s. 3, when land, &c., shall be devised by any testator who died since 1833, to his own heir, such heir shall be considered as taking by

devise and not by descent. Before this act a devise to any one of the *same estate* as he would otherwise have taken as heir-at-law of the deviser, was inoperative, and the devisee took by descent, and not by devise. See *Reading v. Royston*, 1 Salk. 242. See 2 Wms. Saund. 8 h, (z).

If there be a mortgage *for years*, the reversion in fee in the mortgagor is legal assets, and the plaintiff may have judgment with a *cessit executio*; but, where there is a mortgage *in fee*, the equity of redemption is not legal assets. 2 Wms. Saund. 8 i, (4); *Plunket v. Penson*, 2 Atk. 294. So, a copyhold in fee is not assets; 4 Rep. 22 a. By stat. 1 V. c. 26, s. 6 (replacing the Stat. of Frauds, s. 12), an estate *pur autre vie*, which comes to the heir as special occupant, is made assets by descent. Lands which descend in tail are not assets. 1 Roll. Ab. 269 (B). A reversion expectant on an estate tail is not assets, and this may be shown on the general defence of *riens per descent*; *Mildmay's case*, 6 Rep. 42 a; *Kellow v. Rowden*, Carth. 129. But see 12 Vin. Abr. Evid. (Q. b. 19), pl. 3, that it should be specially pleaded. A reversion after an estate for life is *quasi assets*, but it ought to be pleaded specially by the heir, and the plaintiff may take judgment *quando acciderit* Dyer, 373 b.

At common law, if the defendant pleaded *riens per descent*, and the jury found that he had something, however small it might be and insufficient to discharge the debt, the plaintiff was entitled to a general judgment for the debt, damages and costs, and to sue out the like execution against him as on a judgment for his own debt. 2 Wms. Saund. 7 c, (4). It was therefore unnecessary to prove the value of the assets descended. B. N. P. 176. But it is doubtful whether, under 11 G. 4 & 1 W. 4, c. 47, s. 7, *infra*, the jury are not in all cases bound to assess the value of the assets; see *Brown v. Shuker*, *infra*.

Evidence on defence of riens per devise or descent—Reply.] At common law, if the heir had *bouâ fide* aliened the lands which he had by descent, before an action was commenced against him, he might discharge himself by pleading that he had nothing by descent *at the time of suing out the writ*, and the obligee had no remedy at law; 2 Wms. Saund. 8, (4): though under this issue he might show that the heir had aliened the land by covin. *Id.*; Dyer, 149 a, (margin). But now by stat. 11 G. 4 & 1 W. 4, c. 47, s. 7, to an action of debt or covenant upon any specialty brought against any heir, he may plead *riens per descent*, at the time of the writ brought, and the plaintiff may reply that he had lands, tenements, or hereditaments from his ancestor before the writ brought; and if, upon the issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, &c., so descended, and thereupon judgment shall be given, and execution awarded, &c. This section corresponds with the former statute, 3 W. & M. c. 14, s. 5; see *Coope v. Cresswell*, *post*, p. 1169. When issue is joined on this reply, the plaintiff, in addition to the usual proofs under the defence of *riens per descent* must be prepared with evidence of the gross (not the annual) value of the lands descended; and if the jury neglect to find the value the court will award a *venire de novo*; 2 Wms. Saund. 8 a, (4); *Jeffry v. Barrow*, 10 Mod. 18; *Brown v. Shuker*, 1 C. & J. 583.

Evidence in action against heir and devisee.] At common law, if the ancestor had devised the lands, a specialty creditor had no remedy against the devisee. But this is now remedied by stat. 11 G. 4 & 1 W. 4, c. 47, ss. 2, 3 (re-enacting and extending stat. 3 W. & M. c. 14, s. 2), and the creditor may now sue the heir and devisee jointly, on the ancestor's bond or covenant. By sect. 4, where there is no heir, the devisee may be sued alone. As where the testator died after Dec. 31st, 1897, the freehold

estate vests in the heir only after conveyance to him by the executor, it would seem that the heir need not be joined unless such conveyance has been made to him.

As to proof of the devise, *vide ante*, p. 1049. Where the testator died after Dec. 31st, 1897, the assent of the executor under 60 & 61 V. c. 65, s. 3, *ante*, pp. 1049, 1061, must be proved, *vide ante*, p. 1055.

Where real estate was devised by a specialty debtor, to trustees, as to part, in trust for T. E. for life, and remainders over, and as to another part in payment of debts, the trustees conveyed to new trustees, and T. E. mortgaged his equitable estate; it was held that an action would lie under 3 W. & M. c. 14, s. 3, and that neither the conveyance to new trustees nor the mortgage were under sect. 7, such alienations as would defeat the action. *Coope v. Cresswell*, L. R., 2 Ch. 112. When the devisee has alienated the land devised, he makes the testator's specialty debt his own to the extent of the value of the land. *In re Hedgely*, 34 Ch. D. 379.

See further for cases decided on these statutes, Chit. Stat. 3rd ed. vol. iv. p. 922; 5th ed. vol. iv. tit. *Executors*, p. 19.

ACTIONS BY AND AGAINST HUSBAND AND WIFE.

By Rules, 1883, O. xviii. r. 4, "Claims by or against husband and wife may be joined with claims by or against either of them separately."

The Married Women's Property Act, 1882 (45 & 46 V. c. 75), repealing and replacing *Id.* 1870 (33 & 34 V. c. 93), and the Amendment Act, 1874 (37 & 38 V. c. 50), has greatly extended the power of married women to hold a legal estate in property, and to contract, and sue, and their liability to be sued. Under sect. 1 (2, 3, 4), *post*, pp. 1175, 1176, a married woman can contract in respect of her separate estate, present and future, and can sue and be sued, as though she were a feme sole, and her husband need not be joined with her as a party.

In the case, however, of liabilities of the wife, in contract or tort, incurred before marriage, the husband and wife may still be sued jointly, for by sect. 14, "A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the acts relating to joint-stock companies as aforesaid," *vide* sect. 7, *post*, p. 1174, "to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any farther or otherwise; and any court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this act contained shall operate to increase or diminish the liability of any husband married before the commencement of this act for or in respect of any such debt or other liability of his wife as aforesaid.

Sect. 15, "A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action

shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only."

As to what is separate estate of the wife *vide post*, pp. 1172 *et seq.*, and to its liability for ante-nuptial debts, *vide sect. 19, post*, p. 1175.

The effect of sects. 14, 15 on the liability of a husband, H., who has obtained property from his wife, W., for her ante-nuptial liabilities, was much considered by the C. A. in *Beck v. Pierce*, 23 Q. B. D. 316. A judgment recovered under sect. 13, *post*, p. 1176, against W. after marriage in respect of W.'s ante-nuptial debt, and unsatisfied, because she has no separate property, is no bar to an action under sects. 14, 15, against H. S. C. The Statute of Limitations runs in favour of H., in the same way as it runs in favour of W. S. C. And it would seem that no act of W. after marriage will bar the statute. *Id.* 320. The liability of H. is not determined by W.'s death. *Id.* 321. Sect. 15 protects any Englishman married in England, from general liability to pay a debt contracted by his wife, while sole, in a foreign country under the law of which he would be liable. See *De Greuchy v. Wills*, 4 C. P. D. 362.

By analogy to the plea of *plene administravit*, it would seem that when the husband pleads that he is not liable to pay the debt, &c., in respect of any property of his wife as is stated in sects. 14, 15, the onus of proving such assets is on the plaintiff; *vide ante*, p. 1158. See also *Palliser v. Gurney*, *post*, p. 1177. The plaintiff may add to his debt against the wife's estate, the costs which he has to pay the husband under sect. 15. *L. & Provincial Bank v. Bogle*, 7 Ch. D. 773. As to proof of the marriage, if traversed, see *Proof and effect of registers*, *ante*, pp. 125 *et seq.*, 217, 218, and *Action for recovery of land by heir*, *ante*, pp. 1036 *et seq.*

The act does not affect the personal liability at common law of a married woman upon contracts entered into by her *dum sola*. *Robinson v. Lynes*, (1894) 1 Q. B. 577.

Where the husband and wife join in an action for an injury done to the wife, damages awarded to her are her separate property. *Beasley v. Roney*, (1891) 1 Q. B. 509.

In respect of a tort committed by a wife *during* the coverture, the husband and wife are, at common law, liable to be sued jointly, and to satisfy the judgment, whatever its amount may be, obtained in such action. This joint liability has not been removed by the Married Women's Property Act, 1882, s. 1 (2), *post*, p. 1175, and a plaintiff may, in respect of such tort of the wife, now maintain an action, at common law, against the husband and wife, or under sect. 1 (2), against the wife alone. *Earle v. Kingscote*, (1900) 2 Ch. 585, C. A. But the husband cannot be joined when subsequently to the tort, his wife has been divorced from him. *Capel v. Powell*, 17 C. B., N. S. 743; 34 L. J., C. P. 168, see *In re Beauchamp*, (1904) 1 K. B. 572, C. A. At common law the husband and wife could not be sued for a fraud, "directly connected with the contract with the wife, and" which "is the means of effecting it and parcel of the same transaction," as where by representing

herself unmarried the plaintiff was induced to take her promissory note as a security. *Liverpool Adelpbi Loan Association v. Fairhurst*, 9 Exch. 422; 23 L. J., Ex. 163. It is doubtful whether they could be sued for false representations, made by the wife, that certain bills of exchange had been accepted by her husband. *Wright v. Leonard*, 11 C. B., N. S. 258; 30 L. J., C. P. 365. See further, *Earle v. Kingscote*, *ante*, p. 1170.

ACTIONS AGAINST INNKEEPERS.

See pp. 656 *et seq.*

ACTIONS BY AND AGAINST MARRIED WOMEN ALONE.

By Rules, 1883, O. xvi. r. 16, "married women may sue and be sued as provided by the Married Women's Property Act, 1882," *vide post*, pp. 1175-6.

In an action against a married woman in respect of a contract entered into by her after the marriage, the defence of coverture was pleadable in bar, and is, subject to the provisions of the Married Women's Property Act, 1882, s. 1, and *Id.* 1893, s. 1, *post*, pp. 1175, 1177, therefore still a good defence, but it must be pleaded specially. See Rules, 1883, O. xix. r. 15, *ante*, p. 309, and Forms, App. D. s. iv. In other cases where the wife was plaintiff or defendant, her coverture was only pleadable in abatement. See *Dalton v. Midland Counties Ry. Co.*, 13 C. B. 474; 22 L. J., C. P. 177. And the objection must therefore now be taken by an application before the trial, *vide ante*, p. 91. See also the Married Women's Property Act, 1882, the material provisions of which are stated *post*, pp. 1174 *et seq.*

At common law a feme covert cannot be sued as a feme sole, on a contract entered into by her after marriage, although she is living apart from her husband and has a separate and sufficient maintenance; *Marshall v. Rutton*, 8 T. R. 545; even although her husband is resident abroad, and whether he be an Englishman; *Marsh v. Hutchinson*, 2 B. & P. 226; or, a foreigner; *Kay v. Pienne*, *Ds. de*, 3 Camp. 123, 125, Q. B.; *Stretton v. Busnach*, 1 N. C. 139; and see *Boggett v. Frier*, 11 East, 301. The case of *Marshall v. Rutton*, *supra*, decided by nearly all the judges, re-established the old common law, and overruled the prior cases to a contrary effect; S. CC. Even a divorce *à mensa et thoro* for adultery did not so far destroy the relation of husband and wife, as to render her liable as a feme sole. *Lewis v. Lee*, 3 B. & C. 291. But, after a divorce *à vinculo*, the wife becomes a single woman by operation of law, and it is the same as if she had always remained single. *Anstey v. Manners*, Gow, 11. A decree for dissolution of marriage was formerly under 20 & 21 V. c. 85, s. 31, made absolute in the first instance; now, however, by 23 & 24 V. c. 14, s. 7, it is granted as a decree *nisi*, and is afterwards, if no cause be shown, made absolute. In the interval between the decree *nisi* and absolute, the wife has the *status* of a married woman. *Norman v. Villars*, 2 Ex. D. 359, C. A. By 20 & 21 V. c. 85, s. 26, after sentence of judicial separation the wife is, *while so separated*, to be considered as a feme sole for the purpose of contract and wrongs, and of suing and being sued in a civil proceeding. And a wife who has been deserted by her husband, and obtained a protection order under sect. 21, is, *during such desertion*, in a like

position. *Ramsden v. Brearley*, L. R., 10 Q. B. 147; *Ewart v. Chubb*, L. R., 20 Eq. 454. So, where an order has been given to a wife under 58 & 59 V. c. 39; or to a husband under 2 E. 7, c. 28, s. 5 (2), and cohabitation has not been resumed. See *Haddon v. Haddon*, 18 Q. B. D. 778. So, where the husband has abjured the realm; *Lean v. Scutz*, 2 W. Bl. 1199; *Lewis v. Lee*, 3 B. & C. 297; or, has been transported beyond seas as a convict; *Carrol v. Blencow*, 4 Esp. 27; see also *Ex pte. Franks*, 7 Bing. 762; the wife is to be considered as a feme sole. But, a wife cannot sue alone, because her husband is an alien enemy resident abroad; *De Wahl v. Braune*, 1 H. & N. 178; 25 L. J., Ex. 343; nor, it seems, because he has never been in England; see *Barden v. Keverberg*, 2 M. & W. 61, 65, correcting the dictum of Ld. Ellenborough in *Kay v. Pienne*, *Ds. de, ante*, p. 1171.

Except where the marriage is a nullity, it seems proper specially to reply those matters above mentioned, which are an answer to the defence of coverture, and such is the practice. Chit. Preced. 3rd ed. 393, (b). In *Gauer v. Lanesborough, Ly.*, Peake, 17, where the defendant pleaded coverture, Ld. Kenyon, C.J., held that the plaintiff might prove on a traverse of the plea, that the supposed husband had a former wife living. But, the question of nullity on the ground of impotence can only be raised by the other party; *Cavell v. Prince*, L. R., 1 Ex. 247; and during the lifetime of both parties. *A. v. B.*, L. R., 1 P. & M. 559. *Vide ante*, p. 1048.

As to proof of marriage, see *Proof and effect of registers, ante*, pp. 125 *et seq.*, 217, and *Action for recovery of land by heir, ante*, pp. 1038 *et seq.*

Where the defendant's husband had gone abroad 12 years before, and not returned, it was held that she must show that her husband was living at the time of the debt contracted, or within seven years. *Hopewell v. De Pinna*, 2 Camp. 113. The defendant is not estopped by her previous admissions and acts as a feme sole. *Davenport v. Nelson*, 4 Camp. 26.

A wife cannot, after being divorced from her husband, sue him for an assault committed upon her by him during the coverture. *Phillips v. Burnett*, 1 Q. B. D. 436.

The separate estate of a married woman was in equity bound by, and liable to satisfy a contract entered into by her, with reference to such estate; and where she had no other means of satisfying the contract, it was assumed to have been entered into with reference to such estate. *Johnson v. Gallagher*, 3 D. F. & J. 494; 30 L. J., Ch. 298; *Picard v. Hine*, L. R., 5 Ch. 274. Only such estate as she had at the date of the contract was however bound thereby. *Pike v. Fitzgibbon*, 17 Ch. D. 454, C. A.

The husband must in general have been made a co-defendant to any action brought against his wife, in respect of her separate estate; *Holmes v. Penney*, 3 K. & J. 90; *Hancocks v. Lublache*, 3 C. P. D. 197; and the wife was obliged to sue in respect thereof by her next friend, making her husband a party. *Wake v. Parker*, 2 Keen, 59; *England v. Downs*, 1 Beav. 96; *Roberts v. Evans*, 7 Ch. D. 830.

Now, however, by the Married Women's Property Act, 1882, s. 1, *post*, p. 1176, amended by *Id.* 1893, s. 1, *post*, p. 1177, contracts made by a married woman, otherwise than as agent, are presumed to be in respect of, and to bind, her separate estate, present and future, until the contrary is shown, and she may sue, and be sued, as though she were a feme sole, without her husband being joined. See also sect. 12, *post*, p. 1176. For cases decided on these sections, *vide post*, pp. 1177 *et seq.*

Property settled to the separate use of a married woman for life, with power to dispose of it by deed or will, is bound by her contracts. *London Chartered Bank of Australia v. Lempière*, L. R., 4 P. C. 572; *Mayl v. Field*, 3 Ch. D. 587. See *Johnson v. Gallagher*, 3 D. F. & J. 516; 30 L. J., Ch. 309, *per* Turner, L.J., *vide in re Roper*, 39 Ch. D. 482. But the creditor

has not, until judgment, any charge on the property, and cannot therefore until then prevent the woman from dealing with it. *Robinson v. Pickering*, 16 Ch. D. 660, C. A. Income settled to the separate use of a married woman, which she is restrained from anticipating, is not bound by her contracts, even though she fraudulently represent that she has power to charge the same. *Thomas v. Price*, 46 L. J., Ch. 761; *Stanley v. Stanley*, 7 Ch. D. 589; *Stoncham v. Davies*, W. N. 1878, p. 129, C. A. The power to impose such restraint is reserved by sect. 19, *post*, p. 1175; see cases thereon, *post*, p. 1177. The restraint applies even to income due after the date of the judgment. *Draycott v. Harrison*, 17 Q. B. D. 147. It ceases on the death of the husband. *Stogdon v. Lee*, (1891) 1 Q. B. 661, C. A. It must be observed that a gift, to the separate use of a married woman, prior to 1883, is not to be implied from a restraint on anticipation of income given her. S. C. Though it is otherwise since 1882. *In re Lumley*, (1896) 2 Ch. 690, C. A. Where the wife's separate estate is not bound by her contract, she is not bound thereby after her husband's death. *Roberts v. Watkins*, 46 L. J., Q. B. 552. A married woman may carry on a separate trade while residing with her husband; *Ashworth v. Outram*, 5 Ch. D. 923, C. A.; *Lovell v. Newton*, 4 C. P. D. 7; but if he take such a part in the trade as to make himself personally responsible, it is not such separate trade. *Laporte v. Costick*, 31 L. T. 434, M. T. 1874; Q. B. As to the form of judgment against a married woman, see *Scott v. Morley*, 20 Q. B. D. 132, C. A. As to her general liability for costs, see *Cox v. Bennett* and *Hyde v. Hyde*, *post*, p. 1178, and in the case of an action brought by her, see 56 & 57 V. c. 63, s. 2, *post*, p. 1179.

Separate estate of a married woman is, after her death, liable to repay the plaintiff the expense of her burial, which he had incurred. *Hodgson v. Williamson*, 15 Ch. D. 87. Where the property of the wife was vested in trustees it was not necessary, before judgment, to make them parties. *Davies v. Jenkins*, 6 Ch. D. 728. As to the form of judgment prior to the above-mentioned act, see S. C.; *Picard v. Hine*, *ante*, p. 1172; *Collett v. Dickenson*, 11 Ch. D. 687. The claim against the separate estate of a married woman for her debts is barred by analogy to the Statutes of Limitation. *In re Ly. Hastings*, 35 Ch. D. 91, C. A.

As to the right of a married woman to an injunction to restrain her husband from trespassing in the house inhabited by her, it being her separate property, see *Symonds v. Hallett*, 24 Ch. D. 346, C. A. See also *R. v. Jackson*, (1891) 1 Q. B. 671, C. A. He cannot, at any rate, authorise a third person to enter the house for a purpose unconnected with his desire to live with his wife. *Weldon v. De Bathe*, 14 Q. B. D. 339.

Where circumstances exist between a husband A. and his wife B. which would entitle B. to proceed against A. for a matrimonial offence, A. and B. can, without the intervention of a trustee, validly agree together to live apart, and that A. shall pay B. a weekly allowance, in consideration of B. not taking such proceedings against A., or of withdrawing them if commenced. *McGregor v. McGregor*, 20 Q. B. D. 529; 21 Q. B. D. 424, C. A.

The Married Women's Property Act, 1882, largely extends the cases in which the property of married women is held by them to their separate use; its main provisions are stated below.

Married Women's Property Acts, 1882, 1893.] The Married Women's Property Act, 1882, (45 & 46 V. c. 75), which by sect. 25 commenced on Jan. 1st, 1883, repealed the previous acts of 1870 and 1874 (33 & 34 V. c. 93; 37 & 38 V. c. 50).

The following sections relate to the power of a married woman to acquire property to her separate use, and to dispose of the same.

Sect. 1. "(1.) A married woman shall, in accordance with the provisions of this act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property in the same manner as if she were a feme sole, without the intervention of any trustee."

Sect. 2. "Every woman who marries after the commencement of this act" (Jan. 1st, 1883), "shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid, all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill."

Sect. 4. "The execution of a general power by will, by a married woman, shall have the effect of making the property appointed liable for her debts and other liabilities, in the same manner as her separate estate is made liable under this act."

Sect. 5. "Every woman married before the commencement of this act" (Jan. 1st, 1883), "shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property, all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid."

Sect. 6. "All deposits in any post office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stock or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which at the commencement of this act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock or other interests of or in any corporation, company, or public body, municipal, commercial or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this act" (Jan. 1st, 1883) "are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit," &c., "is standing in the sole name of a married woman, shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorize and empower her to receive or transfer the same, and to receive the dividends, interests, and profits thereof without the concurrence of her husband, and to indemnify the Postmaster-General," &c., "in respect thereof."

Sect. 7. "All sums forming part of the public stocks or funds," &c., "as are mentioned in the last preceding section, and all shares," &c., "as aforesaid, which after the commencement of this act" (Jan. 1st, 1883) "shall be allotted to or placed, registered, or transferred in or into or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which so far as any liability may be incident thereto, her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not."

"Provided always, that nothing in this act shall require or authorize any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be

incident, contrary to the provisions of any Act of Parliament, charter, bye-law, articles of association, or deed of settlement regulating such corporation or company."

Sect. 8. "All the provisions herein-before contained as to deposits," annuities, public stock or funds, shares, &c., "as aforesaid respectively, which at the commencement of this act shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this act, or at any time afterwards shall be standing in, or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband."

Sect. 9. "It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit," public stocks or funds, or any shares, &c., "as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband."

Sect. 11. "A married woman may by virtue of the power of making contracts herein-before contained," *vide* sect. 1 (2), *infra*, "effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly."

See the further provisions of this section, and the decisions relating thereto, *ante*, p. 450.

Sect. 18. "A married woman who is an executrix or administratrix alone, or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole*."

Sect. 19. "Nothing in this act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached, or to be hereafter attached, to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property, to be made or entered into by herself, shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man, would have against his creditors."

See sect. 24, *post*, p. 1176, as to the meaning of the words "contract" and "property" in this act.

The following sections relate to the power of a married woman to contract and sue, and her liability to be sued:—

Sect. 1. "(2.) A married woman shall be capable of entering into and rendering herself liable in respect of, and to the extent of her separate property on any contract" (*vide* sect. 24, *post*, p. 1176), "and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she

were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

"(3.) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to, and to bind her separate property, unless the contrary be shown. (4.) Every contract entered into by a married woman with respect to, and to bind her separate property, shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." Repealed by 56 & 57 V. c. 63, s. 4, and replaced by *Id.* s. 1, *post*, p. 1177, as to contracts made after Dec. 4th, 1893.

Sect. 12. "Every woman, whether married before or after this act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies," . . . "for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort."

Sect. 13. "A woman after her marriage shall continue to be liable in respect and to the extent of her separate property, for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this act shall operate to increase or diminish the liability of any woman married before the commencement of this act" (Jan. 1st, 1883), "for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this act, and to which she would not have been entitled for her separate use under the acts hereby repealed or otherwise, if this act had not passed."

Sects. 14, 15, *ante*, p. 1169, relate to the liability of the husband for the ante-nuptial debts, &c., of his wife, and to actions against them jointly, in respect of such debts, &c.

Sect. 18, *ante*, p. 1175, enables a married woman who is executrix, administratrix, or trustee, to sue and be sued without her husband, as though she were a *feme sole*.

Sect. 19, *ante*, p. 1175, while giving effect to settlements containing restrictions against anticipation, prevents such restrictions from being valid, so far as regards a settlement of a woman's own property, against her ante-nuptial debts.

Sect. 23. "For the purposes of this act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living."

Sect. 24. "The word 'contract' in this act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this act as to liabilities of married women, shall extend to all liabilities by

reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word 'property' in this act includes a thing in action."

By the Married Women's Property Act, 1893 (56 & 57 V. c. 63), s. 1, "Every contract hereafter" (*i.e.*, after Dec. 4th, 1893) "entered into by a married woman, otherwise than as agent, (a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; (b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and (c) shall also be enforceable by process of law against all property which she may thereafter while discoverable be possessed of or entitled to: Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating."

Where a wife sues jointly with her husband, the damages awarded her are her separate property. *Beasley v. Roney*, (1891) 1 Q. B. 509.

In the case of contracts entered into before Dec. 5th, 1893, a judgment may, under 45 & 46 V. c. 75, s. 1 (2), *ante*, pp. 1175, 1176, be obtained against a married woman's separate property, present or future, s. 1 (4); but as regards future property, only in respect of a liability incurred by her, since the passing of the act. *Turnbull v. Forman*, 15 Q. B. D. 234, C. A. And the separate property is bound by her contract, only if at the time of making it she had some; *In re Shakespear*, 30 Ch. D. 169; *Palliser v. Gurney*, 19 Q. B. D. 519, M.R. and L.J.J.; *Stogdon v. Lee*, (1891) 1 Q. B. 661, C. A.; with respect to which she might reasonably be deemed to have contracted: property that is inalienable is not such property; *Harrison v. Harrison*, 13 P. D. 180, C. A.; *Leak v. Driffield*, 24 Q. B. D. 98. Nor are the clothes of herself and children bought with her separate income. S. C. The onus of proving that she then had such property lies on the plaintiff. S. C.; *Palliser v. Gurney*, *supra*. In the case, however, of a wife sued for ante-nuptial debts, the plaintiff need not prove that she has separate property. *Downe v. Fletcher*, 21 Q. B. D. 11. As to what is separate property, *vide ante*, p. 1172, 1173. Where the married woman has only separate property, which she is restrained from anticipating, the presumption arising under sect. 1 (3) that she contracted with reference to such property is rebutted. *Harrison v. Harrison*, *supra*. Under sect. 1 (2) a married woman may be sued in respect of anything in respect of which a man can be sued, subject to this, that her power to contract is limited, and that the remedy is confined to her separate estate. *Whittaker v. Kershaw*, 45 Ch. D. 320, 329, *per Fry*, L.J. She may even be sued, although she is restrained from anticipating. S. C. But as to satisfaction of the judgment obtained, *vide post*, p. 1178.

In the case, however, of a contract entered into after Dec. 4th, 1893, by a married woman "otherwise than as agent," it is, by 56 & 57 V. c. 63, s. 1, *supra*, to be deemed to have been entered into with her in respect to and to bind her separate property, although she then has none, and to bind all her subsequently acquired separate property. The acknowledgment, after that date, of a contract entered into before, is not within the act. *In re Wheeler*, (1904) 2 Ch. 66. A wife W. living with her husband H., by his authority ordered under the name of "Mrs. H.," clothes of P.: it was held to be immaterial whether P. did or did not know of the authority, and that there was no evidence that W. contracted "otherwise than as agent," and that she was therefore not liable for their price. *Paquin v. Beaucherk*, (1906) A. C. 148, (where D. P. was equally divided). So where the goods were bought

in France by the wife of a domiciled Englishman as her husband's agent, although by the law of France the spouses were jointly liable. *Beer v. Bell*, (1906) W. N., 114, K. B. D.

Where A. and B. entered into a joint contract, B. being a married woman, contracting in respect of her separate estate, a judgment against A. is a bar to an action against B. *Hoare v. Niblett*, (1891) 1 Q. B. 781, *vide ante*, p. 561.

On the construction of "before her marriage," in 45 & 46 V. c. 75, s. 13, *ante*, p. 1176, see *Jay v. Robinson*, *infra*.

By sect. 19, *ante*, p. 1175, the power of restraint from anticipation is reserved (*vide ante*, p. 1173), and hence it follows that so much only, of the separate income which a married woman is restrained from anticipating, as was due to her when she incurred a post-nuptial liability, is available for the satisfaction thereof. *Draycott v. Harrison*, 17 Q. B. D. 147. So also in the case of an ante-nuptial liability, except as regards the woman's own property, settled by herself after the passing of the act, Aug. 18th, 1882. *Beckett v. Tasker*, 19 Q. B. D. 7; *Birmingham Excelsior Mining Soc. v. Lane*, (1904) 1 K. B. 35, C. A. This protection is preserved by 56 & 57 V. c. 63, s. 1, *ante*, p. 1177. Arrears of separate income, with restraint on anticipation, which have become due at or before the date of the judgment against the married woman, are liable to satisfy the same; *Hood-Barrs v. Heriot*, (1896) A. C. 174, D. P.; *Cox v. Bennett*, (1891) 1 Ch. 617, C. A.; *Hyde v. Hyde*, 13 P. D. 166, C. A.; but income subsequently receivable is not so liable; S. C.; *In re Lumley*, (1894) 3 Ch. 135, C. A.; *Whiteley v. Edwards*, (1896) 2 Q. B. 48, C. A.; *acc. Bolitho & Co. v. Gidley*, (1905) A. C. 98, D. P. Sect. 19 does not prevent the wife's life estate in her property, settled without restriction on anticipation, from passing to her trustee in bankruptcy, for his right does not interfere with, or affect the settlement. *Ex pte. Boyd*, 21 Q. B. D. 264. Restraint on anticipation is not affected by a protection order made under 20 & 21 V. c. 85, s. 21. *Hill v. Cooper*, (1893) 2 Q. B. 85, C. A. A judgment against a married woman can be executed against her separate estate only. *Draycott v. Harrison*, *supra*; *Scott v. Morley*, 20 Q. B. D. 120, C. A., explained in *Holtby v. Hodgson*, 24 Q. B. D. 103, C. A. The removal of the restriction on anticipation by the death of the husband does not render the wife's property liable for her debts incurred during the coverture, further than it was during his lifetime; *Pelton v. Harrison*, (1891) 2 Q. B. 422, C. A.; *Softlaw v. Welch*, (1899) 2 Q. B. 419, C. A.; even when the contract was entered into after Dec. 4th, 1893, her property being protected by the proviso to 56 & 57 V. c. 63, s. 1, *ante*, p. 1177. *Barnett v. Howard*, (1900) 2 Q. B. 784; *Brown v. Dimbleby*, (1904) 1 K. B. 28, C. A. A judgment was obtained against a married woman, her marriage was dissolved, and she married again, the judgment was held to be a "debt contracted before her marriage" within sect. 13, *ante*, p. 1176, so that she still continued liable, and it was also held to be a debt contracted "before marriage," within sect. 19, so that a restriction against anticipation contained in a settlement on her second marriage of property belonging to her, did not prevent the satisfaction of the judgment out of the property. *Jay v. Robinson*, 25 Q. B. D. 467, C. A.

In the case of a woman married before Jan. 1st, 1883, sect. 1, *ante*, pp. 1174, 1175, applies only to property she may acquire after that date. *In re Harris's Settled Estates*, 28 Ch. D. 171. Sect. 5, *ante*, p. 1174, does not apply to property to which she acquired a title before that date, although it fell into possession after it. *Reid v. Reid*, 31 Ch. D. 402, C. A. Nor where there was only a *spes successionis* to property, as one of a class of possible next of kin. *In re Parsons*, 45 Ch. D. 51. Sect. 1 is restricted by sects. 2 and 5, and a woman married before Jan. 1st, 1883, can only dispose of property so far as it falls within sect. 5. *In re Cuno*, 43 Ch. D. 12. So a

woman married after Dec. 31st, 1882, only so far as it falls within sect 2. S. C. As to the effect of a divorce on the joint property of the husband and wife, see *Thorndley v. Thorndley*, (1893) 2 Ch. 229.

A husband, H., cannot, under this act or otherwise, sue his wife, W., for money lent by him to her, or paid by him for her, before the marriage; *Butler v. Butler*, 14 Q. B. D. 831; but he can sue her for money lent by him to her, during the marriage, and for money then paid by him, at her request, made before or after the marriage. S. C., affirm. 16 Q. B. D. 374, C. A. And W. may contract with H. just as though he were not her husband. *Ramsay v. Margrett*, (1894) 2 Q. B. 18, C. A.; *Sweet v. Sweet*, (1895) 2 Q. B. 13. Thus, W. may sue H. on a covenant by him with her to pay her an annuity, contained in a separation deed without a trustee. S. C. In the absence of a *dum casta* clause, the adultery of W. resulting in the birth of a child is no defence to the action. S. C.; *Fearon v. Aylesford, El. of*, 14 Q. B. 792, C. A. A wife may under sect. 12, *ante*, p. 1176, sue her husband for the detention of her chattels and she is not bound to resort to the summary proceedings provided in sect. 17. *Larner v. Larner*, (1905) 2 K. B. 539.

Where a wife, who is liable on a contract in respect of her separate estate, dies intestate, her husband is liable thereon under sect. 23, to the extent of her separate property of which he became possessed on her death *jure mariti*, although he has not taken out administration to her. *Surman v. Wharton*, (1891) 1 Q. B. 491. The act does not alter the devolution of the undisposed of separate personal estate of a married woman; on her death its separate quality ceases, and her executor holds it in trust for her husband. *In re Lambert's Estate*, 39 Ch. D. 626.

By the Bky. Act, 1883, s. 152, nothing in that act is to affect the provisions of the above act.

[*Costs.*] By the Married Women's Property Act, 1893, s. 2, "In any action" . . . "instituted by a woman or by a next friend on her behalf, the court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just."

Where a plaintiff D., a married woman, has been ordered to pay costs to P., the *onus* is on D. to show that the restraint ought to be maintained to the prejudice of P. *Pawley v. Pawley*, (1905) 1 Ch. 593. As to the form of order made under the section, see *Davies v. Treharris Brewery Co.*, (1894) W. N. 198, M. Sit., *cor.* Chitty, J. The section does not apply to an appeal brought by a married woman as defendant. *Hood-Barrs v. Cutheart*, (1894) 3 Ch. 376, C. A.

ACTIONS AGAINST POLICE AUTHORITIES FOR DAMAGE DONE BY RIOTERS.

Damage to property done by rioters was formerly recovered by action against the hundred in which the property was situated, under the Riot Act (1 G. 1, st. 2, c. 5). This and other statutes relating to remedies against the hundred were repealed by 7 & 8 G. 4, c. 27, and their provisions were partially restored, with considerable amendments, by 7 & 8 G. 4, c. 31.

This act has in its turn been repealed by the Riot (Damages) Act, 1886 (49 & 50 V. c. 38), which provides for compensation for damage done by rioters, out of the police rate of the district where the property was situate. Its provisions, so far as are applicable to the purposes of the present work, are as follows:—

By sect. 2, “(1.) Where a house, shop, or building in any police district has been injured or destroyed, or the property therein has been injured, stolen, or destroyed, by any persons riotously and tumultuously assembled together, such compensation as hereinafter mentioned shall be paid out of the police rate of such district to any person who has sustained loss by such injury, stealing, or destruction: but in fixing the amount of such compensation regard shall be had to the conduct of the said person, whether as respects the precautions taken by him or as respects his being a party or accessory to such riotous or tumultuous assembly, or as regards any provocation offered to the persons assembled or otherwise.

“(2.) Where any person having sustained such loss as aforesaid has received, by way of insurance or otherwise, any sum to recoup him, in whole or in part, for such loss, the compensation otherwise payable to him under this act shall, if exceeding such sum, be reduced by the amount thereof, and in any other case shall not be paid to him, and the payer of such sum shall be entitled to compensation under this act in respect of the sum so paid in like manner as if he had sustained the said loss, and any policy of insurance given by such payer shall continue in force as if he had made no such payment, and where such person was recouped as aforesaid otherwise than by payment of a sum this enactment shall apply as if the value of such recoupment were a sum paid.”

By sect. 3, “(1.) Claims for compensation under this act shall be made to the police authority of the district in which the injury, stealing, or destruction took place, and such police authority shall inquire into the truth thereof, and shall, if satisfied, fix such compensation as appears to them just.

“(2.) A Secretary of State may from time to time make, and when made, revoke and vary regulations respecting the time, manner, and conditions within, in, and under which claims for compensation under this act are to be made, and all claims not made in accordance with such regulations may be excluded. Such regulations may also provide for the particulars to be stated in any claim, and for the verification of any claim, and of any facts incidental thereto, by statutory declarations, production of books, vouchers, and documents, entry of premises, and otherwise, and may also provide for any matter which under this act can be prescribed, and for the police authority obtaining information and assistance for determining the said claims.

“(3.) The said regulations shall be published in the London Gazette, and every police authority shall cause the same to be published in their police district, and copies thereof to be at all times sold to any applicant at a price not exceeding 6*d.* for each copy.

Rules have been made under the power given by this section, and are dated July 28th, 1886, and were gazetted on August 3rd, 1886. A summary of them will be found *post*, p. 1181.

By sect. 4, “(1.) Where a claim to compensation has been made in accordance with the regulations, and the claimant is aggrieved by the refusal or failure of the police authority to fix compensation upon such claim, or by the amount of compensation fixed, he may bring an action against the police authority to recover compensation in respect of all or any of the matters mentioned in such claim and to an amount not exceeding that mentioned therein, but if in such action he fails to recover any compensation or an amount exceeding that fixed by the police authority, he shall pay the costs of the police authority as between solicitor and client.

“(2.) If the amount of compensation for which such action is brought does

not exceed 100*l.*, the action shall be brought in the county court for any district in which any part of the police district is situate."

Sect. 5 provides for payment of the compensation recovered out of the police rate.

By sect. 6, "This act shall apply—(a) in the case of the plundering, damage, or destruction of any ship or boat stranded or in distress on or near the shore of any sea or tidal water, or of any part of the cargo or apparel of such ship or boat, by persons riotously and tumultuously assembled together, whether on shore or afloat; and (b) in the case of the injury or destruction, by persons riotously and tumultuously assembled together, of any machinery, whether fixed or movable, prepared for or employed in any manufacture, or agriculture, or any branch thereof, or of any erection or fixture about or belonging to such machinery, or of any steam engine or other engine for sinking, draining, or working any mine or quarry, or of any staith or erection used in conducting the business of any mine or quarry, or of any bridge, waggon-way, or trunk for conveying minerals or other product from any mine or quarry; in like manner as if such plundering, damage, injury, or destruction were an injury, stealing, or destruction in respect of which compensation is payable under the foregoing provisions of this act, and as if, in the case of such ship, boat, or cargo not being in any police district, such plundering, damage, or destruction took place in the nearest police district.

By sect. 7, "For the purposes of this act—(a) where a church or chapel has been injured or destroyed, or any property therein has been injured, stolen, or destroyed, the churchwardens or chapelwardens, if any, or, if there are none, the persons having the management of such church or chapel, or the persons in whom the legal estate in the same is vested; and (b) where a school, hospital, public institution, or public building, has been injured or destroyed, or any property therein has been injured, stolen, or destroyed, the persons having the control of such school, hospital, institution, or building, or the persons in whom the legal estate in the same is vested; shall be deemed to be the persons who have sustained loss from such injury, stealing, or destruction, and claims may be made by any one or more of such persons in relation both to the building and to the property therein, and payment to any such claimant shall discharge the liability of the police authority to pay compensation, but shall be without prejudice to the right of any person to recover the compensation from such payee."

By sect. 9, "In this act, unless the context otherwise requires, the expression 'person' includes a body of persons, corporate or unincorporate: the expression 'house, shop, or building' includes any premises appurtenant to the same."

Police district, police authority, and police rate, are defined in Schedule 1, see sect. 9.

The Local Government Act, 1888 (51 & 52 V. c. 41), s. 3, transferred to the council of each administrative county all business done by the quarter sessions in respect of (xiv.) "any matters arising under the Riot (Damages) Act, 1886."

The Regulations of July 28th, 1886, made by the Secretary of State under sect. 3 (2), *vide ante*, p. 1180, are to the following effect:—

Clause 1 provides that "claims for compensation under the act shall be made in writing," and directs to whom they shall be delivered in the case of the various districts in which the riot may occur.

Clause 2 requires "all claims shall be so delivered" . . . "within 14 clear days after the day when such injury, stealing, or destruction took place." Provided that "the police authority, on application to be made before the expiration of the 14 days, may, for special cause shown, enlarge the period of

14 days to 21 days, and in the event of such application being refused, the applicant may, within seven days after such refusal, appeal to the Secretary of State, and his decision shall be conclusive as to whether the claim shall be received."

By clause 3, "All claims shall be on forms prepared for the purpose and obtainable from any of the publishing firms whose names are printed on the back of these Regulations."

By clause 4, "The claim shall specify the name and address of the claimant, the day and hour on which the injury, stealing, or destruction took place; and as to the premises, whether they are a house, shop, or building, and where they are situated, and the nature of the claimant's interest therein."

By clause 5, "The claim shall state separately the sums claimed for—(a) destruction of premises; (b) injury to premises (including injury to windows, fittings, or fixtures thereof); (c) injury to other property in or on the premises; (d) theft or destruction of other property in or on the premises; distinguishing, as regards (c) and (d) property belonging to the claimant from property belonging to others in his care."

By clause 6, where the claim is in respect of *injury* done either to premises or to property therein, it shall state shortly the nature of the injury, and either the actual cost of repair with vouchers, or an estimate of the cost, as the case may be.

By clause 7, where the claim is in respect of *property* in or upon premises, it must state whether such property has been injured, stolen, or destroyed, and be accompanied with vouchers.

By clause 8, "In all cases the claim shall state generally the evidence which the claimant is prepared to offer in support of it, and the place where such documents as he proposes to put in evidence may be inspected; and" to what compensation, if any, the claimant is entitled to receive, and from whom.

By clause 9, "The claimant shall verify the claim by himself making such a statutory declaration, and by procuring and furnishing to the police authority such statutory declarations of other persons as the police authority may require: and he shall produce" all such documents under his control as are needed to support his claim, and deliver copies thereof or extracts therefrom as may be required, and shall give access to the premises and produce the property for injury to which the claim is made.

Clause 10 contains special provisions as to awards in respect of property in the care only of the claimant, and also in the case of the property having been stolen.

By clause 12, "The above regulations shall, with the necessary variations, apply :—(a) in the case of the plundering, damage, or destruction of any ship or boat stranded or in distress, on or near the shore of any sea or tidal water, or of any part of the cargo or apparel of such ship or boat, by persons riotously and tumultuously assembled together; and (b) in the case of the injury or destruction, by persons riotously and tumultuously assembled together, of any machinery (whether fixed or movable) prepared for or employed in any manufacture or agriculture, or any branch thereof, or of any erection or fixture about or belonging to such machinery, or of any steam engine or other engine for sinking, draining, or working any mine or quarry, or of any staith or erection used in conducting the business of any mine or quarry, or of any bridge, waggon-way, or truck for conveying minerals or other product from any mine or quarry."

The plaintiff must be prepared to prove, 1, his interest in the property injured; 2, the offence; 3, that it was committed within the police district, against the authority over which he has brought his action; 4, the compliance with regulations of the Secretary of State made under sect. 3 (2), *ante*,

p. 1180; 5, the refusal or failure of the police authority to fix any or adequate compensation; 6, the amount of damage.

Some of the cases cited hereafter are decisions on the old statutes, but seem to be applicable to the present act.

Interest of the plaintiff.] The bare trustee of a satisfied term is entitled to sue for damages. *Pritchit v. Waldron*, 5 T. R. 14 (Riot Act). Parties jointly interested in the property may join in the action. *Winterstoke Hundred case*, Dyer, 370 a (Stat. Winton). Where the property injured consists of a church or chapel, or belongs to a corporation, sect. 7 points out the parties who are to sue. *Quære?* whether the words "church or chapel" include a dissenters' meeting-house. In the repealed statute 7 & 8 G. 4, c. 31, s. 2, words were introduced expressly to include such a building. A reversioner may sue for the damage sustained by him. *Pellaw v. Wonford*, 9 B. & C. 134. Though the police authority may thereby be subjected to several actions. *Id.* 142 (Black Act). One of two lessees may recover, according to his share or interest. *Lowe v. Broxtowe*, 3 B. & Ad. 558. As to an insurer, see sect. 2 (2), *ante*, p. 1180.

The offence.] It was formerly necessary to prove that the riot was a felonious one, but it is now sufficient if the property is injured, destroyed, or stolen "by any persons riotously and tumultuously assembled together;" and this difference renders the decisions on the former act inapplicable to the present one.

A riot is a disturbance of the peace by 3 persons at the least, who, with an intent to help one another against any person who opposes them in the execution of some enterprise or other, actually execute that enterprise in a violent and turbulent manner to the alarm of firm and courageous people. Whether such enterprise be a lawful or unlawful one does not matter, nor does the reading of the proclamation under the Riot Act, 1 G. 1, st. 2, c. 5. *R. v. Cunninghamne Graham*, 16 Cox, 420, *cor.* Charles, J.

The riotous assembly, to be within sect. 2 (1), need not be in a public place. *Gunter v. Metropolitan Police District, Receiver of*, 53 J. P. 249, Mich. S., 1888, *cor.* Mathew, J.

Committed within the police district.] The offence must be proved to have been committed within the police district named in the statement of claim. This may be proved by showing by reputation that it is in a parish forming part of the police district; *vide ante*, pp. 49, 50; or that a police rate for that district was made on the premises.

Compliance with Secretary of State's regulations.] It must be shown that the regulations of the Secretary of State, a summary of which is given, *ante*, p. 1181, which are applicable to the plaintiff's case, have been complied with; for such compliance is, by sect. 4, *ante*, p. 1180, a condition precedent to commencing the action against the police authority.

Refusal or failure of police authority to fix compensation.] It must be shown that the police authority fixed no compensation, or less than the plaintiff demanded.

Amount of damage.] Under the present act, damages are recoverable for injury to personal property, irrespective of any injury to a house or building, but the conduct of the person injured, as respects the precautions taken by him, and as respects his being a party to the riot, or provoking the same, is to be taken into account in assessing the damages. The riot may have been

provoked by the conduct of the claimant or his representatives, to such an extent as entirely to disentitle the claimant to damages. *Gunter v. Metropolitan Police District, Receiver of*, ante, p. 1183. The case of receipt, under a policy of insurance, of compensation for the injury, is provided for by sect. 2 (2), ante, p. 1180.

Costs.] Where a verdict for not more than that fixed by the police authority, the judge is by sect. 4 (1), ante, p. 1180, to direct costs to the defendant as between solicitor and client; vide S. C.

ACTIONS AGAINST POSTMASTERS AND LETTER CARRIERS.

See ante, p. 651.

ACTIONS AGAINST SHERIFFS.

Liability of sheriff for the act of his officer.] By the Sheriff's Act, 1887, 50 & 51 V. c. 55, s. 15, "A person unlawfully imprisoned by a sheriff or any of his officers shall have an action against such sheriff in like manner as against any other person that should imprison him without warrant," and at common law a sheriff is liable civilly for the tortious act, default, or misconduct, whether it be wilful or inadvertent, of his under-sheriff or bailiff, in the course of the execution of their duties; as, where the bailiff takes improper fees. *Woodgate v. Knatchbull*, 2 T. R. 149. And the high bailiff of a county court is in the same position. *Watson v. White*, (1896) 2 Q. B. 9. The sheriff is civilly liable for whatever the bailiff improperly does under the colour of the writ; and, therefore, the sheriff is liable if the officer take a person into custody under a *fi. fa.* *Smart v. Hutton*, 8 Ad. & E. 568, n. In *Gregory v. Cotterell*, 5 E. & B. 571; 25 L. J., Q. B. 33, Ex. Ch., the debtor paid the debt to an assistant bailiff at the bailiff's office on the execution of a *fi. fa.*, and it was held a satisfaction of the writ as against the sheriff. But, if the act complained of be neither expressly sanctioned by the sheriff nor impliedly committed by his authority, the sheriff is not responsible. *Cook v. Palmer*, 6 B. & C. 739; *Crowder v. Long*, 8 B. & C. 598. Therefore, as it is no part of the sheriff's duty to receive payment of the amount for which a judgment debtor is in his custody on a *ca. sa.*, he will not be liable if his bailiff receive the amount of such debt from the debtor and misappropriate it, or neglect to pay it within a reasonable time to the creditor. *Woods v. Pinnis*, 7 Exch. 363. If an execution creditor induce the bailiff to depart from the ordinary course of his duty without the sheriff's knowledge, *Cook v. Palmer*; *Crowder v. Long*, supra; or, collude with the officer; *Raphael v. Goodman*, 8 Ad. & E. 565, it is not competent to such creditor to fix the sheriff with the consequences.

The sheriff occasionally, at the request of the party suing out the writ or his solicitor, appoints a particular person to execute it. Such person is called a special bailiff. The sheriff is not liable to the party appointing a special bailiff for the acts of such bailiff. *De Moranda v. Dunkin*, 4 T. R. 119. Questions have arisen as to what amounts to such an appointment. Whether what is said, or written, or done, does so amount, seems rather a question of

fact than of law. *Ford v. Leech*, 6 Ad. & E. 691; *Balson v. Meggat*, 4 Dowl. 557. The mere expression of a wish by the solicitor that a particular officer may be employed to execute the writ, does not constitute the latter a special bailiff. *Porter v. Viner*, 1 Chitty, 613; *Alderson v. Davenport*, 13 M. & W. 42. Where, the plaintiff having sued out a *ca. sa.* against one H., her agent requested the under-sheriff to direct the warrant thereon to an officer named by him, took the warrant, and himself delivered it to the officer, accompanied by him to the house where H. was to be met with, and encouraged the officer to make the caption in an illegal manner, it was held, in an action against the sheriff for the escape of H. from his custody, that, under the circumstances, the officer was a special bailiff, and the sheriff was not liable. *Doe v. Trye*, 5 N. C. 573; see *Corbet v. Brown*, 6 Dowl. 794. But, the sheriff was liable for the safe custody of the party when arrested by such bailiff. *Taylor v. Richardson*, 8 T. R. 505. As to assent by the judgment debtor to irregularities of the officers, see *Wright v. Child*, L. R., 1 Ex. 358. Where the sheriff acts judicially, he is not liable for the act or default of his officer. *Tanno v. Morris*, 2 C. M. & R. 298.

[*Proof of connection between sheriff and officer.*] In order to establish the connection between the sheriff and his bailiff, and to affect the former with the acts of the latter, the warrant should in general be proved: though it is not the only medium by which the privity of the sheriff to the act of his bailiff may be established. *Martin v. Bell*, 1 Stark. 417. Proof of the warrant, issued in the sheriff's name by the under-sheriff or his clerk acting for him at his office, under the sheriff's seal of office, is sufficient without proof of the writ. *Gibbins v. Phillipps*, 7 B. & C. 535, n. See also *Harris v. Ashley*, 1 Selw. N. P., 13th ed. 525; *Brandon v. Hibbert*, 4 Camp. 37; *Doe d. James v. Brown*, 5 B. & A. 243. If the warrant remain in the hands of the bailiff (as it usually does for his justification), a *subpœna duces tecum* should be served upon him. If it has been returned to the sheriff's office, a notice to produce should be given, and secondary evidence will then be admissible; and where the warrant, after the levy, has been returned by the bailiff to the under-sheriff, the sheriff still being in office, it was held that a notice to produce, served upon the attorney of the sheriff, was sufficient. *Taplin v. Atty*, 3 Bing. 165. Where the warrant was not returned to the sheriff's office, but was given by the officer to a third person, and it could not be found after diligent inquiry, secondary evidence of its contents was admitted without giving a notice to produce. *Minshall v. Lloyd*, 2 M. & W. 450. It is not sufficient, in order to establish the connection between the sheriff and bailiff, to show that the latter is the bound bailiff of the former, and to produce and prove a paper, received from the bailiff, purporting to be a copy of the warrant; *Drake v. Sykes*, 7 T. R. 113; nor, is it sufficient to produce an examined copy of the precept with the bailiff's name indorsed on it, though the sheriff has returned *cepi corpus*. *Martin v. Bell*, 1 Stark. 413. So, where an examined copy of the writ and return, with the bailiff's name written on the margin, was produced, Lord Ellenborough held it insufficient to connect the sheriff with his acts. *Jones v. Wood*, 3 Camp. 228; *Hill v. Leigh*, Holt, N. P. 217; 7 Taunt. 8; *Morgan v. Brydges*, 2 Stark. 314. But, according to *Blatch v. Archer*, Cowp. 63; *McNeil v. Perchar*, 1 Esp. 263; *Fernor v. Phillips*, 5 B. Moore, 184, n.; 3 B. & B. 27, n.; and *Bowden v. Waithman*, 5 B. Moore, 183, it should seem that the fact of the bailiff's name appearing upon the writ, without further proof, is evidence to go to the jury of the connection between the sheriff and the bailiff. If the writing of the bailiff's name on the writ is proved to have been by the authority of the sheriff, it will then clearly be sufficient to establish this connection. Thus where, in an action for escape, the writ

produced bore two indorsements, and the witness, who produced the writ, said that he belonged to the sheriff's office, that the writ came to the sheriff's office from the plaintiff's agent marked with the bailiff's name, and that he (the witness) again indorsed the bailiff's name on it, the court thought the sheriff's authority sufficiently proved. *Francis v. Neave*, 3 B. & B. 26. So, where the plaintiff offered in evidence the writ with the name of the bailiff indorsed upon it, and it was also proved that the writ had been sent to the under-sheriff's office, where the name of the bailiff had been indorsed upon it; and that the custom of the office was to indorse upon the writ the name of the bailiff who was to execute it, Richards, C.B., held this evidence sufficient. *Teulby v. Gascoigne*, 2 Stark. 202. So, where an examined copy of the writ, returned by the sheriff with the officer's name indorsed, was produced, and the writ was shown to have been executed by a person of that name, and the course of the sheriff's office was to grant a warrant to the officer whose name was indorsed, or, if not, to strike the name out and insert that of another officer, the evidence was held to be *primâ facie* sufficient to fix the sheriff. *Scott v. Marshall*, 2 C. & J. 238. A paper produced, on notice, from the sheriff's office, containing an order to the bailiff to give the necessary instructions for making a return to the writ, and his answer, was held to amount to a clear recognition of the bailiff by the sheriff. *Jones v. Wood*, 3 Camp. 229. So, where a bail-bond, which had been executed and delivered to the bailiff, had been returned to the sheriff, who had made his return of *cepi corpus*, Ld. Ellenborough held that this was sufficient to prove the agency of the bailiff. *Martin v. Bell*, 1 Stark. 416. Proof by the officer, of seizure under a warrant brought to him by one who said it came from the sheriff's office, and that he knew the handwriting on it, but had since lost it, was held sufficient to admit oral evidence of its contents. *Moon v. Raphael*, 2 Scott, 489; 7 C. & P. 115. In an action against the sheriff for taking the plaintiff's goods, proof by the officer that he took the goods under a warrant which he produced, and which he stated that he received from Messrs. A. & Co., the London agents of the sheriff, and proof by the under-sheriff that Messrs. A. & Co. were the London agents of the sheriff, was held sufficient to connect the sheriff with the officer. *Shepherd v. Wheble*, 8 C. & P. 534: see also *Barsham v. Bullock*, 10 Ad. & E. 23; and *Reed v. Thoyts*, 6 M. & W. 410.

Admission by officers of the sheriff.] The under-sheriff is in general the deputy of the high sheriff for all purposes; *per* Ld. Kenyon, C.J.; *Drake v. Sykes*, 7 T. R. 116: and, therefore, his admissions are evidence against the sheriff without previous proof of his authority in the particular instance, provided they accompany some official act done, or are made with reference to a matter in which the under-sheriff himself is the party to be charged. *Snowball v. Goodricke*, 4 B. & Ad. 541. But as the *bailiff* is not the general officer of the sheriff, it is necessary to show his agency in the particular instance before an admission by him can be made evidence against the sheriff, and it will then only be evidence in the same manner and to the same extent as an admission by any other agent. See *North v. Miles*, 1 Camp. 389; *Bowsher v. Calley*, *Id.* 391, n. Declarations made by the officer, whilst in possession under a *fi. fa.*, after the return of it, are evidence against the sheriff. *Jacobs v. Humphrey*, 2 Cr. & M. 413. See also *ante*, p. 69.

Sheriff not liable for the acts of his predecessor.] A new sheriff, B., is not liable for any neglect by his predecessor, A., in the execution of a writ delivered to A., and which has not been turned over and transferred by A. to B. under stat. 50 & 51 V. c. 55, s. 28, as not wholly executed by A. See *Davidson v. Seymour*, M. & M. 34.

Death of sheriff.] As to liability of under-sheriff on the death of the sheriff, see *Gloucestershire Banking Co. v. Edwards*, cited *post*, p. 1220.

The evidence in actions against sheriffs will be further considered under the following heads:—

1. For wrongfully taking the plaintiff's goods in execution.
2. For taking the goods of a tenant in execution, without paying arrears of rent.
3. For not paying over money levied.
4. For not levying, and for false return on final process.
5. For extortion.

A sheriff was also formerly liable to an action in the following cases:—

6. For not arresting on mesne process.
7. For an escape after arrest on mesne process.
8. For an escape in execution.
9. For not taking in execution.

A sheriff was formerly liable at the suit of the plaintiff in an action for not arresting a defendant on mesne process, or for suffering him to escape after arrest thereon, provided special damage could be shown, but as arrest on mesne process has been abolished by the Debtors Act, 1869, s. 6, *ante*, p. 887, this action will no longer be brought. That section gives a judge power to order a defendant's arrest, in certain very limited cases, as to which, *vide ante*, p. 887, and although an action might doubtless be brought against the sheriff for any damage the plaintiff has sustained by reason of the neglect of the sheriff to obey the judge's order, yet as it seems impossible to show any damage resulting from such disobedience, it is very improbable that the action would be attempted. In the present edition, therefore, the cases decided with reference to arrest or escape on mesne process are omitted: they will be found in some earlier editions of this work; see 13th ed., pp. 1240 *et seq.* With reference to the action for escape after arrest on an order in the nature of mesne process, see further the Sheriff's Act, 1887, s. 16 (1), and Prisons Act, 1877, s. 57, and observations thereon, *infra*, and *post*, p. 1188.

A sheriff was formerly also liable to an action at the suit of an execution creditor for the escape of his judgment debtor whom he had arrested on a *ca. sa.* Under 13 E. 1, st. 1 (Westm. 2), c. 11, and 1 R. 2, c. 12, the action was one of debt, for the whole amount of the judgment debt; 1 Wms. Saund. 38, (2); but by 5 & 6 V. c. 98, s. 31, this action of debt was abolished, and an action on the case was substituted in which the plaintiff was entitled to recover from the sheriff the value of the execution debtor's custody; and at all events nominal damages. See *Hobson v. Thelluson*, L. R., 2 Q. B. 642, 651, *per* Blackburn, J. This section is now repealed by the Sheriff's Act, 1887 (50 & 51 V. c. 55), which, by sect. 16 (1), provides that "If a person in the custody of the sheriff or any of his officers, or of any other person, either in execution or for non-performance of a judgment or order of the High Court of Justice, or for contempt of that court, or otherwise, in the course of a civil proceeding, escapes out of legal custody, such sheriff or other person shall be liable to pay the damages sustained by the person at whose suit such prisoner was taken into custody, and all costs of any action or other proceeding to recover the same, but not any further sum." By the Debtors Act, 1869, s. 4, cited *ante*, p. 886, no person can be arrested or imprisoned, with certain exceptions therein mentioned, for making default in payment of a sum of money, and a *ca. sa.* can only be issued in the case of a judgment for a penalty other than a penalty in respect of a contract, and in this excepted case the imprisonment can be for one year only.

By the Sheriff's Act, 1887, s. 16 (2), "the sheriff shall not be liable for the escape of any prisoner, when confined in any prison subject to the Prison Act,

1877." A prisoner is, by the Prison Act, 1877 (40 & 41 V. c. 21), s. 57, defined to be "any person committed to prison on remand or for trial, safe custody, punishment, or otherwise." This provision exempts a sheriff from liability for the escape of a person arrested by him, except while in the custody of the sheriff's bailiff, and the cases in which an action for escape could be brought are so rare that the decisions relating thereto have not been retained here; they will be found collected in some earlier editions of this work; see 13th ed., pp. 1243 *et seq.*

A judgment debtor committed to prison by a judge's order under the Debtors Act, 1869, s. 5, *ante*, p. 887, would be a "prisoner" under the Prisons Act, 1877, s. 57, *supra*, and the sheriff would not therefore be liable for his escape. A judgment debtor so committed may be taken at once to prison. *Mitchell v. Simpson*, 25 Q. B. D. 183, C. A., cited *ante*, p. 918. The sheriff was liable for damages for unnecessary delay in executing a *ca. sa.* without actual damage being shown. *Clifton v. Hooper*, 6 Q. B. 468. The above observations will apply also to this cause of action.

1. Action for wrongfully taking the plaintiff's goods in execution.

In trespass or trover against a sheriff for taking the plaintiff's goods, the plaintiff, as in actions against any other trespasser, may be put to prove the property of the goods, and the taking or conversion by the defendant.

In all cases the sheriff must, at his peril, execute the writ only on the goods of the party therein mentioned; for if he seize the goods of a stranger, he will be liable to an action; Bro. Abr. Trespass, pl. 99; and this, although in the possession of, and apparently belonging to the party against whom the writ issued. *Dawson v. Wood*, 3 Taunt. 256. The goods of a woman cohabiting with the judgment debtor cannot be taken in execution, although she pass for his wife; *Edwards v. Bridges*, 2 Stark. 396; *Glasspoole v. Young*, 9 B. & C. 696; unless the circumstances would warrant a jury in finding that the property was given up by the woman to the debtor. *Edwards v. Farebrother*, 3 C. & P. 524; 2 Moo. & P. 293; see also *Langford v. Foot*, 2 Moo. & Sc. 349. The goods of a testator or intestate cannot, in general, be taken in execution for the personal debt of the executor or administrator, unless the executor or administrator has made the goods his own. *Farr v. Newman*, 4 T. R. 621; *Quick v. Staines*, 1 B. & P. 293. Where the executrix used the goods of her testator as her own, and afterwards married, and then treated them as her husband's, it was held that she could not, in an action by the husband and wife, *jure uxoris*, object to the same having been taken in execution for the husband's debt. S. C. So, in case of possession by a trustee, as such, for a long time. *Fenwick v. Laycock*, 2 Q. B. 108. But, possession and use of the house and goods of testator are not *per se* enough to make the goods liable to be seized in execution for the executor's debt; *Gaskell v. Marshall*, 1 M. & Rob. 132; even although the executors have there for some years carried on the testator's business under the provisions of his will. *In re Morgan*, 18 Ch. D. 93. Execution against an executor *de son tort* cannot be levied on the goods of the deceased, which are in the hands of such executor as the agent of the rightful executor, who has subsequently taken out probate. *Sykes v. Sykes*, L. R., 5 C. P. 113.

An action for converting or detaining goods was held not to be maintainable against a sheriff for seizing under a *fi. fa.* the property of an insolvent, after notice that it was excepted by him from his schedule under the 7 & 8 V. c. 96, s. 9. *Rideal v. Fort*, 11 Exch. 847; 25 L. J., Ex. 204. The remedy was said to be by applying to the court to stay proceedings. The sheriff may sell goods which are let or bailed for a term to the defendant, but can only sell his interest therein. If he sell the same *absolutely*, he will not be liable

to an action for conversion at the suit of the owner of them, A., unless at the time of seizure he was entitled to possession; *Bradley v. Copley*, 1 C. B. 685; though such a sale by the bailee himself would be wrongful, and would enable the bailor to sue him or his vendee immediately. *Cooper v. Willomatt*, *Id.* 672; *Fenn v. Bittleston*, 7 Exch. 152; 21 L. J., Ex. 41. And see *Tancred v. Allgood*, 4 H. & N. 438; 28 L. J., Ex. 362. Where, however, the sheriff seizes and sells goods to which A. is entitled to immediate possession, he is liable at A.'s suit. *Manders v. Williams*, cited *ante*, p. 918. And a County Court high bailiff is liable in a like case. *Jelks v. Hayward*, (1905) 2 K. B. 460. Where T. claimed goods seized under an execution, and deposited 25*l.* to release the goods, pending the trial of an interpleader issue which was decided against her, and the judgment creditor, H., then took the 25*l.* in part satisfaction of his judgment, it was held that H. could not seize these goods a second time to satisfy the balance. *Haddow v. Morton*, (1894) 1 Q. B. 95, 565, C. A. Tenants' fixtures may be taken in execution, but if by agreement with the landlord they are not to be removed till the end of the term, the sheriff cannot take them during the term. *Dumergue v. Rumsey*, 2 H. & C. 777; 33 L. J., Ex. 88. Ex. Ch. By stat. 56 G. 3, c. 50, the sheriff is bound by the execution debtor's written agreements with his landlord as to the disposition of crops, manure, &c. Cf. stat. 6 E. 7, c. 56, ss. 3, 9, *ante*, p. 349. The binding effect of the writ of execution of the goods, under the Sale of Goods Act, 1893, s. 26 (1), replacing earlier acts, has already been noticed, *ante*, p. 964.

As to fraudulent assignments of goods as against creditors, and the provisions of the acts in relation to bills of sale, see *post*, pp. 1191 *et seq.*

If a sheriff, after notice of the allowance of proceeding in error, executed a *fi. fa.*, he was liable in trespass. *Belshaw v. Marshall*, 4 B. & Ad. 336. A sheriff who has entered under a *fi. fa.*, and continues on the premises in possession of the goods for more than a reasonable time, is liable in trespass for so continuing beyond the time allowed by law. *Ash v. Dawney*, 8 Exch. 237; 22 L. J., Ex. 59; *Lee v. Dangar*, (1892) 1 Q. B. 231. If a sheriff break into a house for the purpose of executing a *fi. fa.*, the execution against the goods would seem to be valid, but the sheriff is liable to an action for the breaking. *Percival v. Stamp*, 9 Exch. 167; 23 L. J., Ex. 25. See 1 Smith's L. C., 11th ed. 116 *et seq.* A sheriff cannot sell for his fees, without authority from the execution creditor, when the debt of the latter has been satisfied. *Sneary v. Abdy*, 1 Ex. D. 299.

[*Evidence of property.*] In general it will be sufficient for the plaintiff to show that he was in possession of the goods at the time of the seizure, which will be *primâ facie* evidence of the property. If he were not in possession himself, but he rely upon an assignment from a former owner, proof of possession of such former owner, and of the assignment, will be *primâ facie* evidence of property in the plaintiff. An assignment of property to a creditor, in trust for himself and the other creditors, passes the property at once, for assent to the grant will be presumed. *Siggers v. Evans*, 5 E. & B. 367; 24 L. J., Q. B. 305; *Hobson v. Thelluson*, L. R., 2 Q. B. 612. See further, *ante*, pp. 726, 954.

[*Evidence of the taking, &c.*] As to the sheriff's liability for the act of his officer, see *ante*, p. 1184; and as to evidence to prove connection between them, see *ante*, pp. 1185 *et seq.* The production of a bill of sale executed by the defendant, reciting the issuing of a writ and seizure of the goods, will be evidence of a taking. *Woodward v. Larking*, 3 Esp. 286. A sheriff's officer may be made co-defendant with the bailiffs in a case of illegal entry, if he took the direction in the levy, though not actually present. *Brunswick, Dk. of v. Stowman*, 8 C. B. 317.

Damages.] Where the sheriff was sued for seizing and selling the entire interest in goods of which the debtor and the plaintiff were lawfully possessed, whereby they were carried away by persons unknown, and lost to the plaintiff, it was held that, in the absence of proof of the exact proportion of interest in the goods, the plaintiff was entitled to half the proceeds or value. *Mayhew v. Herrick*, 7 C. B. 229. Where the sheriff has sold for a less sum than the plaintiff, a *bonâ fide* assignee, gave for them, the jury may award the larger sum as damages. *Lockley v. Pye*, 8 M. & W. 133. Where a sheriff's officer executed a *fi. fa.* against the plaintiff illegally, by breaking an outer door, and the plaintiff paid, under protest, the amount indorsed, and also a gratuity demanded by the officer, it was held, that the jury might include the whole amount and gratuity in the damages, both being mentioned in the declaration. *Brunswick, Dk. of v. Slowman*, ante, p. 1189.

Defence.

In an action for taking the plaintiff's goods in execution, the most usual defence is, that the goods had been fraudulently assigned to the plaintiff, and were in fact the goods of the party against whom the writ issued. This defence is admissible under a denial of the plaintiff's property. *Ashby v. Minnitt*, 8 Ad. & E. 121. But the defendant cannot, under the latter defence, show that the plaintiff became assignee of the goods after delivery of the writ to the sheriff. *Samuel v. Duke*, 3 M. & W. 622. As to the defence where the form of action is for trespass, or for conversion or for detention, respectively, *vide ante*, pp. 927, 981, 997. As to justification under process, *vide ante*, p. 916.

A sheriff, where he sets up a claim to goods taken in execution by him, as against a third party, must show a judgment against the execution creditor; his production of the writ of execution alone is not sufficient. *White v. Morris*, 11 C. B. 1015; 21 L. J., C. P. 185.

Evidence of fraudulent assignment.] We have already noticed, *ante*, pp. 964, 965, that the sheriff may (in some cases) where the execution debtor has sold or assigned his goods before the writ is executed, seize and sell them, notwithstanding such sale or assignment. If the assignment, &c., was made before the delivery of the writ to the sheriff, but *fraudulently*, with intent to delay, hinder, or defraud creditors, it will be void under stat. 13 El. c. 5, as against them. *Twyne's case*, 3 Rep. 80; 1 Smith's L. C. The intent must be proved; the mere fact that the creditors were delayed is not conclusive. *Ex pte. Mercer*, *In re Wise*, 17 Q. B. D. 290, C. A.; *Godfrey v. Poole*, 13 Ap. Ca. 497, J. C.; *In re Holland*, (1902) 2 Ch. 369, C. A. But the intent may be inferred from the surrounding circumstances. *In re Maddever*, 27 Ch. D. 523; *Barling v. Bishopp*, 29 Beav. 417. Future creditors are within the benefit of the act if the assignment would necessarily have the effect of delaying them. S. C.; *Spiro v. Willows*, 5 Giff. 49; 34 L. J. Ch. 365; *Freeman v. Pope*, L. R., 5 Ch. 538; *Ex pte. Russell*, 19 Ch. D. 588, C. A.; *In re Ridler*, 22 Ch. D. 74, C. A. See cases collected in 1 Smith's L. C., 11th ed., pp. 20 *et seq.* and *Ideal Bedding Co. v. Holland*, 76 L. J., Ch. 441. The delay of a single creditor is within the statute. *Edmunds v. Edmunds*, (1904) P. 362. The fact that there was no consideration, or no valuable one for the assignment,—as if it were made in consideration of natural love and affection,—is evidence of fraud. *Gale v. Williamson*, 8 M. & W. 405. If it does not appear on the assignment that there was a valuable consideration for making it, evidence may be given *aliunde* to prove such fact, for the purpose of rebutting the presumption of fraud. S. C. See further, *ante*, p. 19. A covenant in a marriage settlement

to settle after acquired property is not, on the face of it, fraudulent. *Ex pte. Clough*, (1901) 2 K. B. 769, C. A. (no decision on this point (1905) A. C. 442, D. P.). Continuance in possession of goods and chattels by a vendor after the execution of a bill of sale, is a badge and evidence of fraud; *Twyne's case*, ante, p. 1190; *Edwards v. Harben*, 2 T. R. 587; but not conclusive evidence of it. *Martindale v. Booth*, 3 B. & Ad. 498; *Carr v. Burdiss*, 1 C. M. & R. 782. Therefore, if the possession be consistent with the deed; *Reed v. Wilmot*, 7 Bing. 577; as if it be a mortgage, and, by its terms, the debtor is to remain in possession until default; *Martindale v. Booth*, supra; *Minshall v. Lloyd*, 2 M. & W. 450; or, a marriage settlement under which the debtor takes an equitable interest for life; *Cudogan v. Kennett*, Cowp. 432; or, if the sale be notorious, such as a sale made publicly by a sheriff under an execution; *Lalimer v. Batson*, 4 B. & C. 652; *Kidd v. Rawlinson*, 2 B. & P. 59; or, by public auction; *Leonard v. Baker*, 1 M. & S. 251; *Jezeph v. Ingram*, 1 Moore, 189; or, if it be made with the knowledge and assent of the person who seeks to impugn it; *Steele v. Brown*, 1 Taunt. 381; the assignment is in general valid, though the vendor or original owner remains for some time in possession; see notes to *Twyne's case*, in 1 Smith's L. C. A sale for good consideration is not fraudulent and void, merely because it is made with the intention to defeat an expected execution. *Wood v. Dixie*, 7 Q. B. 892; *Holbird v. Anderson*, 5 T. R. 235. And see *Darvill v. Terry*, 6 H. & N. 807; 30 L. J., Ex. 355. Nor is a *bonâ fide* assignment of the debtor's property for the benefit of certain creditors void under the act, although it might be otherwise under the Bankruptcy Acts, as a fraudulent preference. *Alton v. Harrison*, L. R., 4 Ch. 622; *Allen v. Bonnet*, L. R., 5 Ch. 577; *Ex pte. Gaines*, 12 Ch. D. 314, C. A.; *Boldero v. L. & Westminster Discount Co.*, 5 Ex. D. 47; *Muskelyne, &c. v. Smith*, (1903) 1 K. B. 671, C. A.; and see *Evans v. Jones*, 3 H. & C. 423; 34 L. J., Ex. 25. The deed may be good as to some interests and void as to others. See *Halifax, &c., Banking Co. v. Gledhill*, (1891) 1 Ch. 31.

Where A. has assigned goods to B. by bill of sale for valuable consideration, and A. afterwards gives B. a second bill of sale of the same goods, this amounts to a cancellation of the first bill, and the original consideration will support the second bill. *Smule v. Burr*, L. R., 8 C. P. 61; *Ramsden v. Lupton*, L. R., 9 Q. B. 17, Ex. Ch. Where, however, A. has, without the knowledge of B., become bankrupt between the granting of the two bills of sale, the second does not affect the first. *Ex pte. Hastuck*, (1894) 1 Q. B. 414.

As to the effect of a grant of goods which are not in existence or do not belong to the grantor at the time of executing the deed, *vide ante*, p. 954.

In order to prove the fraud, declarations made by the assignor at the time of executing the bill of sale are admissible as part of the *res gestæ*; but not if made at another time. *Phillips v. Eumer*, 1 Esp. 355; *Penn v. Scholey*, 5 Esp. 243; *Lewis v. Rogers*, 1 C. M. & R. 48, cited ante, p. 52. Where A. sued out a writ of *fi. fa.* against the goods of B., and the sheriff executed a bill of sale of certain goods of B. to A., after which B., remaining in possession of the goods, the sheriff again took them under another execution against B.; in an action of trover by A. against the sheriff for taking these goods, it was held that the declarations of B. at the time of the second execution were evidence for the defendant to show that A.'s execution was colourable. *Willies v. Farley*, 3 C. & P. 395.

*Bills of Sale Acts.**] Bills of sale of personal chattels have by statute been rendered void as against trustees in bankruptcy, and execution creditors, unless registered as thereby required. The first act requiring such

* Cited for brevity as B. of S. Act, 1854; B. of S. Act, 1866; B. of S. Act, 1878; B. of S. Act, 1882; B. of S. Act, 1890; and B. of S. Act, 1891.

registration was the Bills of Sale Act, 1854 (17 & 18 V. c. 36). This act was amended by the Bills of Sale Act, 1866 (29 & 30 V. c. 96), which required registration to be renewed every five years. From and after 1st Jan., 1879, these acts were repealed by the Bills of Sale Act, 1878 (41 & 42 V. c. 31), ss. 2, 23, except as to bills of sale executed before that day, in respect of which bills those acts remain in force. See *Cookson v. Swire*, 9 Ap. Ca. 653, D. P. The renewal of the registration of a bill of sale registered under the repealed acts is, however, to be made as provided by the B. of S. Act, 1878. Sect. 7, *post*, p. 1193, enacts a rule of construction as to a bill of sale of fixtures or growing crops, which is to apply to all bills of sale whenever executed.

The B. of S. Act, 1882 (45 & 46 V. c. 43), is by sect. 3, *post*, p. 1196, to be construed with the B. of S. Act, 1878; it, however, applies only to bills of sale given as a security for money, and, therefore, as to other bills of sale, the B. of S. Act, 1878, remains in full force; *vide post*, p. 1209.

The B. of S. Act, 1891 (54 & 55 V. c. 35, s. 1), amending the B. of S. Act, 1890 (53 & 54 V. c. 53, s. 1), relates only to charges on imported goods. *Vide post*, p. 1198.

It seems the most convenient course first to set out somewhat fully the provisions of the B. of S. Acts, 1878, 1882, indicating as far as possible by italics the changes introduced in the former act by the latter, in the cases in which it applies; then to state the decisions applicable to the acts. The analogous sections of the B. of S. Acts, 1854, 1866, are referred to in brackets.

The B. of S. Act, 1878, by sect. 2, came into operation on Jan. 1st, 1879; and, by sect. 3, applies to every bill of sale executed on or after that day “(whether the same be absolute, or subject or not subject to any trust), whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale.” [B. of S. Act, 1854, s. 1.]

Sect. 4. “In this act the following words and expressions shall have the meanings in this section assigned to them respectively, unless there be something in the subject or context repugnant to such construction; (that is to say,)

“The expression ‘bill of sale’ shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred, but shall not include the following documents; that is to say, assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business, of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers’ certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented:

“The expression ‘personal chattels’ shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but shall not include chattel interests in real estate, nor fixtures (except trade machinery as

hereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow, nor shares or interests in the stock, funds, or securities of any government, or in the capital or property of incorporated or joint stock companies, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement or of the custom of the country ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale;” *q.v.* stat. 6 E. 7, c. 56, ss. 3, 9, *ante*, p. 349:

“Personal chattels shall be deemed to be in the ‘apparent possession’ of the person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person” [B. of S. Act, 1854, s. 7]:

“‘Prescribed’ means prescribed by rules made under the provisions of this act.” By sect. 21, such rules may be made and altered by the same persons and in the same manner as rules are made under the J. Acts, 1873, 1875.

Sect. 5, “From and after the commencement of this act trade machinery shall, for the purposes of this act, be deemed to be personal chattels, and any mode of disposition of trade machinery by the owner thereof which would be a bill of sale as to any other personal chattels shall be deemed to be a bill of sale within the meaning of this act.”

For the purposes of this act—

“‘Trade machinery’ means the machinery used in or attached to any factory or workshop; exclusive of (1) the fixed motive-powers, such as the water-wheels and steam engines,” and the fixed appurtenances thereof; (2) the fixed power machinery, such as shafts, and their fixed appurtenances, which transmit the action of the motive powers to the other machinery, fixed and loose; (3) the pipes for steam, gas, and water in the factory or workshop; which machinery or effects so excluded “shall not be deemed to be personal chattels within the meaning of this act.”

“‘Factory or workshop’ means any premises on which any manual labour is exercised by way of trade, or for purposes of gain, in or incidental to the (a) making, (b) altering, repairing, ornamenting, finishing, or (c) adapting for sale any article.

Sect. 6. “Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this act, of any personal chattels which may be seized or taken under such power of distress.

“Provided that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent.”

Sect. 7. “No fixtures or growing crops shall be deemed, under this act, to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the land on which they grow, without otherwise taking possession of or dealing with such land or building, or land, if by the same instrument any freehold or leasehold interest in the land or

building to which such fixtures are affixed, or in the land on which such crops grow, is also conveyed or assigned to the same persons or person.

"The same rule of construction shall be applied to all deeds or instruments, including fixtures or growing crops, executed before the commencement of this act and then subsisting and in force, in all questions arising under any bankruptcy, liquidation, assignment for the benefit of creditors, or execution of any process of any court, which shall take place or be issued after the commencement of this act."

Sect. 8. "*Every bill of sale to which this act applies shall be duly attested and shall be registered under this act, within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given, otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also as against all sheriffs' officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any court authorizing the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which, at or after the time of filing the petition for bankruptcy or liquidation, or of the execution of such assignment, or of executing such process (as the case may be), and after the expiration of such seven days are in the possession or apparent possession of the person making such bill of sale (or of any person against whom the process has issued under or in the execution of which such bill has been made or given, as the case may be.)*" [B. of S. Act, 1854, s. 1.] In respect of bills of sale given as security for money, the B. of S. Act, 1882, s. 8, *post*, p. 1197, is substituted for the section which is so far repealed.

Sect. 9. "Where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale, and comprises all or any part of the personal chattels comprised in such prior bill of sale, then, if such subsequent bill of sale is given as a security for the same debt as is secured by the prior bill of sale, or for any part of such debt, it shall, to the extent to which it is a security for the same debt or part thereof, and so far as respects the personal chattels or part thereof comprised in the prior bill, be absolutely void, unless it is proved to the satisfaction of the court having cognizance of the case that the subsequent bill of sale was *bonâ fide* given for the purpose of correcting some material error in the prior bill of sale, and not for the purpose of evading this act."

Sect. 10. "A bill of sale shall be attested and registered under this act in the following manner:

"(1.) *The execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor.*"

In respect of bills of sale given as security for money, the B. of S. Act, 1882, s. 10, *post*, p. 1196, is substituted for this sub-section, which is so far repealed.

"(2.) Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any

person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness to such bill of sale, shall be presented to, and the said copy and affidavit shall be filed with the registrar, within seven clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed:" [B. of S. Act, 1854, s. 1.]

"(3.) If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this act therewith and as part thereof, otherwise the registration shall be void." [B. of S. Act, 1854, s. 2.]

"In case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels.

"A transfer or assignment of a registered bill of sale need not be registered."

Sect. 11. "The registration of a bill of sale, whether executed before or after the commencement of this act, must be renewed once at least every five years, and if a period of five years elapses from the registration or renewed registration of a bill of sale, without a renewal or further renewal (as the case may be), the registration shall become void. The renewal of a registration shall be effected by filing with the registrar an affidavit stating the date of the bill of sale and of the last registration thereof, and the names, residences, and occupations of the parties thereto as stated therein, and that the bill of sale is still a subsisting security. Every such affidavit may be in the form set forth in the schedule (A.) to this act annexed." [B. of S. Act, 1866, ss. 4, 5.]

"A renewal of registration shall not become necessary by reason only of a transfer or assignment of a bill of sale."

By sect. 12, the registrar shall keep a book (called "the register"), and shall, upon the filing of any bill of sale or copy under this act, enter therein the particulars of the bill of sale in the form given in the 2nd schedule of the act, or in any other prescribed form, with the date of filing, and shall number all such bills registered in each year consecutively, according to the respective dates of their registration. "Upon the registration of any affidavit of renewal the like entry shall be made, with the addition of the date and number of the last previous entry relating to the same bill, and the bill of sale or copy originally filed shall be thereupon marked with the number affixed to such affidavit of renewal." [B. of S. Act, 1866, ss. 5, 7.]

By sect. 13, and 42 & 43 V. c. 78, ss. 5, 6, 7, and Rules, 1883, O. lxi., rr. 1, 25, bills of sale are registered in the bills of sale department of the Central Office, under the superintendence of the Masters of the Supreme Court of Judicature. [B. of S. Act, 1854, s. 1; 1866, ss. 5, 7.]

Sect. 14. "Any judge of the High Court of Justice on being satisfied that the omission to register a bill of sale or an affidavit of renewal thereof within the time prescribed by this act, or the omission or misstatement of the name, residence, or occupation of any person, was accidental or due to inadvertence, may in his discretion, order such omission or misstatement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration on such terms and conditions (if any) as to security, notice by advertisement or otherwise, or as to any other matter, as he thinks fit to direct."

Sect. 15. "Subject to and in accordance with any rules to be made under and for the purposes of this act, the registrar may order a memorandum of satisfaction to be written upon any registered copy of a bill of sale upon the prescribed evidence being given that the debt (if any) for which such bill of sale was made or given has been satisfied or discharged." [B. of S. Act, 1854, s. 6.]

Sect. 16. "Any copy of a registered bill of sale, and affidavit purporting to be an office copy thereof, shall in all courts, and before all arbitrators or other persons, be admitted as *primâ facie* evidence thereof, and of the fact and date of registration as shown thereon."

Sect. 17. "Every affidavit required by or for the purposes of this act may be sworn before a master of any division of the High Court of Justice" (now of the Supreme Court of Judicature, *vide ante*, p. 1195), "or before any commissioner empowered to take affidavits in the Supreme Court of Judicature." [B. of S. Act, 1866, s. 9.]

Sect. 20. "*Chattels comprised in a bill of sale which has been and continues to be duly registered under this act shall not be deemed to be in the possession, order, or disposition of the grantor of the bill of sale within the meaning of the Bankruptcy Act, 1869.*" In respect of bills of sale given as security for money, this section is repealed by the B. of S. Act, 1882, s. 15. See also the B. of S. Act, 1891, s. 1, *post*, p. 1198.

By sect. 21, rules may be made for the purposes of the act.

Sect. 22. "When the time for registering a bill of sale expires on a Sunday, or other day on which the registrar's office is closed, the registration shall be valid if made on the next following day on which the office is open."

Sect. 24. "This act shall not extend to Scotland or to Ireland." [B. of S. Act, 1854, s. 8; 1866, s. 11.]

The Bills of Sale Act (1878) Amendment Act, 1882, 45 & 46 V. c. 43, came into operation on Nov. 1st, 1882.

Sect. 3. "The Bills of Sale Act, 1878, is hereinafter referred to as 'the principal act,' and this act shall, so far as is consistent with the tenor thereof, be construed as one with the principal act; but unless the context otherwise requires shall not apply to any bill of sale duly registered before the commencement of this act so long as the registration thereof is not avoided by non-renewal or otherwise.

"The expression 'bill of sale,' and other expressions in this act, have the same meaning as in the principal act, except as to bills of sale, or other documents mentioned in section four of the principal act, which may be given otherwise than by way of security for the payment of money, to which last-mentioned bills of sale and other documents this act shall not apply."

Sect. 4. "Every bill of sale shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale; and such bill of sale, save as hereinafter mentioned, shall have effect only in respect of the personal chattels specifically described in the said schedule; and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described."

Sect. 5. "Save as hereinafter mentioned, a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto, of which the grantor was not the true owner at the time of the execution of the bill of sale."

Sect. 6. "Nothing contained in the foregoing sections of this act shall render a bill of sale void in respect of any of the following things; (that is to say),

"(1.) Any growing crops separately assigned or charged where such crops were actually growing at the time when the bill of sale was executed.

“(2.) Any fixtures separately assigned or charged, and any plant or trade machinery where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule to such bill of sale.”

Sect. 7. “Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes:—

“(1.) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security;

“(2.) If the grantor shall become a bankrupt, or suffer the said goods, or any of them, to be distrained for rent, rates, or taxes;

“(3.) If the grantor shall fraudulently either remove or suffer the said goods, or any of them, to be removed from the premises;

“(4.) If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes;

“(5.) If execution shall have been levied against the goods of the grantor under any judgment at law:

“Provided that the grantor may within five days from the seizure or taking possession of any chattels on account of any of the above-mentioned causes, apply to the High Court, or to a judge thereof in chambers, and such court or judge, if satisfied that by payment of money or otherwise the said cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just.”

Sect. 8. “Every bill of sale shall be duly attested, and shall be registered under the principal act within seven clear days after the execution thereof, or if it is executed in any place out of England then within seven clear days after the time at which it would in the ordinary course of post arrive in England if posted immediately after the execution thereof; and shall truly set forth the consideration for which it was given; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein.”

Sect. 9. “A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this act annexed.” *

* SCHEDULE.

FORM OF BILL OF SALE.

This Indenture made the _____ day of _____, between *A.B.* of _____ of the one part, and *C.D.* of _____ of the other part, witnesseth, that in consideration of the sum of £ _____ now paid to *A.B.* by *C.D.*, the receipt of which the said *A.B.* hereby acknowledges [*or whatever else the consideration may be*], he the said *A.B.* doth hereby assign unto *C.D.*, his executors, administrators, and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £ _____, and interest thereon at the rate of _____ per cent. per annum [*or whatever else may be the rate*]. And the said *A.B.* doth further agree and declare that he will duly pay to the said *C.D.* the principal sum aforesaid, together with the interest then due, by equal payments of £ _____ on the _____ day of _____ [*or whatever else may be the stipulated times or time of payment*]. And the said *A.B.* doth also agree with the said *C.D.*

Sect. 10. "The execution of every bill of sale by the grantor shall be attested by one or more credible witness or witnesses, not being a party or parties thereto. So much of section ten of the principal act as requires that the execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and that the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting witness, is hereby repealed."

Sect. 12. "Every bill of sale made or given in consideration of any sum under 30*l.* shall be void."

Sect. 13. "All personal chattels seized or of which possession is taken after the commencement of this act, under or by virtue of any bill of sale (whether registered before or after the commencement of this act), shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized or so taken possession of."

Sect. 14. "A bill of sale to which this act applies shall be no protection in respect of personal chattels included in such bill of sale which but for such bill of sale would have been liable to distress under a warrant for the recovery of taxes and poor and other parochial rates."

Sect. 15. "The 8th and the 20th sections of the principal act, and also all other enactments contained in the principal act which are inconsistent with this act are repealed, but this repeal shall not affect the validity of anything done or suffered under the principal act before the commencement of this act."

Sect. 17. "Nothing in this act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company."

Sect. 18. "This act shall not extend to Scotland or Ireland."

By the B. of S. Act, 1891, 54 & 55 V. c. 35, s. 1, "An instrument charging or creating any security on or declaring trusts of imported goods given or executed at any time prior to their deposit in a warehouse, factory, or store, or to their being reshipped for export or delivered to a purchaser not being the person giving or executing such instrument, shall not be deemed a bill of sale within the meaning of the Bills of Sale Acts, 1878 and 1882." See *Ex pte. Carter*, *post*, p. 1199.

Under the B. of S. Act, 1878, ss. 3, 4, *ante*, p. 1192, bills of sale are limited to documents, whereby the grantee has power to seize or take possession of any personal chattels comprised in the bill of sale; the acts do not therefore "include letters of hypothecation accompanying a deposit of goods by merchants or factors, or pawntickets given by pawnbrokers, or, in fact, any case where the object and effect of the transaction are immediately to transfer the possession from the grantor to the grantee." *Ex pte. Close*, 14 Q. B. D. 386, 393; *Attenborough's Case*, 28 Ch. D. 682; *Ex pte. Hubbard*, 17 Q. B. D. 690, C. A. (explaining *Ex pte. Parsons*, 16 Q. B. D. 532, C. A.); approved and followed in *Mills v. Charlesworth*, (1892) A. C. 231, D. P.; *Hilton v. Tucker*, 39 Ch. D. 669; *Ramsay v. Margrett*, (1894) 2 Q. B. 18, C. A.; see

that he will [*here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security*].

Provided always, that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said C.D. for any cause other than those specified in section seven of the Bills of Sale Act (1878) Amendment Act, 1882.

In witness, &c.

Signed and sealed by the said A.B. in the presence of me E.F. [*add witness' name, address, and description*].

also *Ex pte. Carter*, (1905) 2 K. B., 381, 772, C. A. So a delivery order given by the pledgor to the pledgee on a warehouseman in whose care the goods are, delivered to the latter, changes the possession, and is not a bill of sale. *Grigg v. National Guardian Assur. Co.*, (1891) 3 Ch. 206. But it seems that a pledge by a trader of stock in trade which he has bought and not paid for, is not a transfer in the ordinary course of business of his trade or calling. *Ex pte. Close*, *ante*, p. 1198.

Under the B. of S. Act, 1851, a receipt for a sum of money as the price of household goods and effects, stated to have been purchased on the day of the receipt, was not a bill of sale within the act. *Allsop v. Day*, 7 H. & N. 157; 31 L. J., Ex. 105; *Byerley v. Prevost*, L. R., 6 C. P. 144. Nor was a receipt, containing an inventory, given by a sheriff's officer for the price of goods sold under an execution. *Woodgate v. Godfrey*, 5 Ex. D. 24, C. A. Where, however, independently of such document there was no sale of the goods, and there was one transaction constituted by the inventory and the receipt thereto attached, and if there had been no document there would have been no transaction, the document requires registration. S. C. *Id.* p. 26, *per M.R.*; *Ex pte. Odell*, 10 Ch. D. 76, C. A.; *Ex pte. Cooper*, *Id.* 313, C. A. And notwithstanding the wider definition given by the B. of S. Act, 1878, s. 4, *ante*, p. 1192, the above distinction holds good; and unless the inventory and receipt constitute an assurance of some legal or equitable interest in the goods, registration is not necessary. *Marsden v. Meadows*, 7 Q. B. D. 80, C. A.; *Newlove v. Shrewsbury*, 21 Q. B. D. 41, C. A.; *N. Central Wagon Co. v. Manchester, &c. Ry. Co.*, 35 Ch. D. 191, C. A.; 13 Ap. Ca. 554, D. P., and *vide Id.* p. 269, *per Ld. Macnaghten*; *Mills v. Charlesworth*, *Ramsay v. Margrett*, *ante*, p. 1198. Sect. 4 includes all agreements giving a charge in equity. But, an oral agreement to give a bill of sale; *Ex pte. Hauxwell*, 23 Ch. D. 626, C. A.; or amounting to a mortgage; *Redhead v. Westwood*, 59 L. T., 293, T. S. 1888; *United Forty Pound Loan Club v. Berton*, (1891) 1 Q. B. 28, n., does not require registration. In the case of a sale of land and trade machinery, the B. of S. Acts do not affect the vendor's lien arising by implication of law; *In re Vulcan Ironworks Co.*, (1888) W. N. 37, H. S., North, J.; unless the agreement for sale waives the lien. *In re L. & Lancashire Paper Mills Co.*, *Id.* 36; 58 L. T. 798, *cor. Id.* An agreement giving a vendor a lien, analogous to the ordinary vendor's lien, is now a bill of sale; *Coburn v. Collins*, 35 Ch. D. 373; unless it is a pledge by letter of hypothecation in the ordinary course of trade; *Ex pte. N. W. Bank*, L. R., 15 Eq. 69. A memorandum in writing of a sale of goods, essential to its validity, under the Stat. of Frauds, s. 17 (now replaced by the S. of G. Act, 1893, s. 4), is an assurance within the B. of S. Act, 1878, s. 4. *In re Roberts*, 36 Ch. D. 196. An agreement by a brewer to let a public-house, gave him the same right to distrain for the price of liquor sold as he had for rent; it was held this provision was distinct from the rest of the agreement and was a licence to take possession of chattels as security for a debt, within sect. 4, and therefore a bill of sale and void. *Stevens v. Marston*, 60 L. J., Q. B. 192, C. A.

An agreement for the purchase by B. of furniture from A. on "the hire system," whereby B. hires the furniture of A., on the terms that it shall become B.'s property when certain instalments have been paid, with liberty to A. to seize the furniture on default by B. to pay any instalment, is not a bill of sale granted by B., for the property in the furniture remains in A. until all the instalments are paid. *Ex pte. Crawcour*, 9 Ch. D. 419, C. A.; *McEntire v. Crossley*, (1895) A. C. 457, D. P. It makes no difference that the furniture originally belonged to B. and was sold by him to A. on the terms that B. should so repurchase it on the "hire system" above described, for a contract of sale coupled with an option of purchase differs entirely from a mortgage. *N. Central Wagon Co. v. Manchester, &c. Ry. Co.*, 13 Ap. Ca.

554, 567, *per* Ld. Macnaghten. In such case, however, the real nature of the transaction must be inquired into by oral evidence, beyond the mere hiring agreement, and if it be merely a device for giving A. security for a loan to B., to be repaid by instalments, so as to evade the B. of S. Acts, the written hiring agreement signed by B. will be a bill of sale, and the security will be void if not registered, whether against the trustee in bankruptcy of A.; *In re Watson*, 25 Q. B. D. 27, C. A.; *Maas v. Pepper*, (1905) A. C. 102 D. P.; or against A. himself; *Madell v. Thomas*, (1891) 1 Q. B. 230, C. A.; *Beckett v. Tower Assets Co.*, (1891) 1 Q. B. 638, C. A. Where the hiring agreement is not a bill of sale, neither is a mortgage to C. by A., of his interest therein. *Ex pte. Rawlings*, 22 Q. B. D. 193, C. A.

Sub-mortgages of registered bills of sale do not fall within sect. 4, *ante*, p. 1192, but within sect. 10, *ante*, p. 1195, and do not therefore require registration. *Ex pte. Turquand*, 14 Q. B. D. 636, C. A.

The exceptions in the B. of S. Act, 1878, s. 4, *ante*, p. 1192, relating to bills of sale, include an informal agreement for a marriage settlement; *Wenman v. Lyon*, (1891) 1 Q. B. 634; 2 Q. B. 192, C. A.; and an assignment of chattels, after marriage, in pursuance of a covenant is a marriage settlement to settle after acquired property. *Ex pte. Clough*, (1904) 2 K. B. 769, C. A. (no decision on this point (1905) A. C. 442, D. P.); but not a post-nuptial settlement in trustees for the benefit of wife and children; *Fowler v. Foster*, 28 L. J., Q. B. 210; *Ashton v. Blackshaw*, L. R., 9 Eq. 510; unless made in pursuance of ante-nuptial articles, for in such case the articles form the real settlement. See *Wenman v. Lyon*, *supra*. The exceptions include a bill of sale of a ship, even though neither the ship nor the bill of sale are registered under the Merchant Shipping Act, 1894. *Union Bank of London v. Lennanton*, 3 C. P. D. 243, C. A. See also *Srainston v. Clay*, 32 L. J., Ch. 503. So a dumb barge propelled by oars; *Gapp v. Bond*, 19 Q. B. D. 200, C. A.; or a hopper barge. See *The Mue*, 7 P. D. 126, C. A. So they include a letter of hypothecation, given in the ordinary course of business. See *Ex pte. Close* and other cases cited *ante*, p. 1198. As to an assignment for the benefit of creditors, see *General Furnishing, &c. Co. v. Venn*, 2 H. & C. 153; 32 L. J., Ex. 220; *Boldero v. L. & Westminster Discount Co.*, 5 Ex. D. 47; *Hadley v. Beedon*, (1895) 1 Q. B. 646. It is to be observed that such instruments must now be registered under stat. 50 & 51 V. c. 57, *post*, pp. 1216, 1217.

A bill of sale of personal property in Scotland, to which country the act does not apply (see B. of S. Act, 1878, s. 24, *ante*, p. 1196), is not within the act. *Coote v. Jecks*, L. R., 13 Eq. 597.

Under the B. of S. Act, 1878, ss. 4, 5, 7, a mortgage of freehold lands by its owner does not require registration, for the property in the fixtures, including "trade machinery" (see sect. 5, *ante*, p. 1193), passes as part of the freehold, even although trade machinery is in terms conveyed. *In re Yates*, 38 Ch. D. 112, C. A.; *In re Brooke*, (1894) 2 Ch. 600. Where, however, the mortgage gives the mortgagee some right over the trade machinery which he would not otherwise have had, it requires registration. *Small v. National Provincial Bank of England*, (1894) 1 Ch. 686. Under the B. of S. Act, 1854, where a lessee of land for years, the absolute owner of fixtures thereon, by way of mortgage, sub-demised the land, and assigned the fixtures, he dealt with them in their character as fixtures separate from the ownership of the land, and the deed required registration. *Hawtry v. Butlin*, L. R., 8 Q. B. 290; *Ex pte. Daglish*, L. R., 8 Ch. 1072; *Ex pte. Brown*, 9 Ch. D. 389, C. A. The test was whether the deed gave the mortgagee power to enter and sever the fixtures and deal with them separately: if so, the deed required registration; but, if it merely gave him the use of the fixtures during the term, it was otherwise. *Ex pte. Barclay*, L. R., 9 Ch. 576; *Ex pte. Alexander*, 4 Ch. D. 503. See also *Southport, &c. Banking Co. v. Thompson*, 37 Ch. D. 64, C. A.

So in the case of a freehold mortgage, *Johns v. Ware*, (1899) 1 Ch. 359. The distinction above stated applies under the B. of S. Act, 1878, in the case of trade machinery; *Snally v. National Provincial Bank of England*; *In re Yates*, *ante*, p. 1200; but not, it seems, in any other case, since under sect. 7, *ante*, p. 1193, which is retrospective in its operation, a mortgage with the land, of fixtures, not being trade machinery, does not now require registration. S. C., 38 Ch. D. 120, *per* Cotton, L.J. See further on this section *Ex pte. Moore & Robinson's Banking Co.*, 14 Ch. D. 379. The trade machinery excepted by sect. 5, *ante*, p. 1193, are not personal chattels within the act for any purpose. *Ex pte. Byrne*, 20 Q. B. D. 310, C. A.; *Topham v. Greenside Glazed Firebrick Co.*, 37 Ch. D. 281. An equitable mortgage of land and buildings with fixtures, by deposit of deed only, is governed by the same rules as a mortgage by deed. *Ex pte. Tweedy*, 5 Ch. D. 559. The undivided share of a partnership, part of the property of which includes fixtures, is not included in the term fixtures. *Ex pte. Fletcher*, 8 Ch. D. 218. See further, *Ex pte. Brown*, *ante*, p. 1200.

An agreement in writing between A. and B., by which it was agreed that B. should build on A.'s land, and which provided that all materials brought by B. on the land should become the property of A., is not a bill of sale under the B. of S. Act, 1878, s. 4. *Reeves v. Barlow*, 12 Q. B. D. 436, C. A.; see also *Ex pte. Newitt*, 16 Ch. D. 522, C. A.; and *Morris v. Délobbel-Flipo*, (1892) 2 Ch. 352. But it is otherwise where there is a mortgage by B. to A. of land and buildings in course of erection thereon, and of building materials brought thereon, which B. covenanted should be considered as part of the fee simple of the land, with a licence to A. to enter and sell the materials on default of payment of the mortgage money, for such mortgage is a bill of sale so far as relates to the materials. *Climpson v. Coles*, 23 Q. B. D. 465.

An agreement, providing that an agent shall be covered for his expenses by the stock of his principal's goods in his hands, is not a bill of sale. *Morris v. Délobbel-Flipo*, (1892) 2 Ch. 352.

Growing crops, although not severed, are personal chattels within the B. of S. Act, 1878, s. 4, *ante*, p. 1192, where they are assigned separately from the land whereon they grow. See also sect. 7, *ante*, p. 1193.

By the B. of S. Act, 1882, s. 4, *ante*, p. 1196, a bill of sale given as security for money must have a schedule containing an inventory of the goods specifically described therein, and is void, except as against the grantor, in respect of goods not so specifically described. By sect. 5, *ante*, p. 1196, the bill of sale is, except as against the grantor, void as to any goods so described, not his property at the time of execution of the bill of sale; but by sect. 6, *ante*, pp. 1196, 1197, the provisions of sects. 4, 5, do not apply (1) to growing crops separately charged, or (2) to fixtures separately assigned, or trade machinery, &c., used on the land, &c., in substitution for like fixtures, &c., specifically described. And by sect. 9 such a bill of sale is void—if not in the form given by the schedule, or (sect. 12) if given in consideration for less than 30*l*. *Vide post*, pp. 1211 *et seq*.

A policy of life assurance is a chose in action. *Ex pte. Ibbetson*, 8 Ch. D. 519, C. A. So is an undivided share in a partnership. *Ex pte. Fletcher*, *Id*. 218.

The construction of the B. of S. Act, 1878, s. 4, as to apparent possession is, "that the goods shall be deemed in the apparent possession of the vendor as long as they are on premises occupied by him, *if nothing more* has been done to them than the *mere* formal taking possession;" *Gough v. Ererard*, 2 H. & C. 1, 12; 32 L. J., Ex. 210, 214, *per* Bramwell, B.; followed in *Smith v. Wall*, 18 L. T. 183, H. T. 1868, Ex.; if, however, the vendee have taken actual possession of the goods, and they no longer appear to be in the possession of the vendor, the goods are not within sects. 4, 8, notwithstanding

they remain on premises, &c., occupied by the vendee. S. CC. It is immaterial that the grantee has taken possession by means that would *per se* have been a fraudulent preference. *Ex pte. Symmons*, 14 Ch. D. 693. The possession may be taken, among other ways, by packing up the goods for removal; *Ex pte. Jay*, L. R., 9 Ch. 697; or by advertising them for sale as the goods of the grantor sold under a bill of sale. *Emanuel v. Bridger*, L. R., 9 Q. B. 286; *Smith v. Wall*, *ante*, p. 1201. But, it is not sufficient merely to advertise the goods for sale, although the advertisement refers to a solicitor for particulars, as it does not appear that the sale is not by the grantor himself. *Ex pte. Lewis*, L. R., 6 Ch. 626. And a demand merely, or an unsuccessful attempt to obtain possession, does not take the goods out of the act. *Ancona v. Rogers*, 1 Ex. D. 285. Possession of a bailee is possession of his bailor, and cannot be altered by a demand made on the former. S. C. See further *Ex pte. Fletcher*, 5 Ch. D. 809, C. A. Nor is it sufficient to obtain a conditional order appointing a receiver, until the condition has been satisfied. *Edwards v. Edwards*, 2 Ch. D. 291, C. A. Where a man is sent into possession, and remains there without interfering with the use of the goods by the grantor, this is a mere formal possession within sect. 4. *Ex pte. Hooman*, L. R. 10 Eq. 63. But, where the sheriff is in possession of the goods in the ordinary way, under an execution, they cease to be in the apparent possession of the execution debtor. *Ex pte. Saffery*, 16 Ch. D. 668, C. A. The occupation of the grantor, intended by the section, is an actual *de facto* occupation: a constructive occupation is insufficient. *Robinson v. Briggs*, L. R., 6 Ex. 1. Where a wife buys of her husband the furniture in the house in which she is living with him, and they continue living there as before, the possession follows the title, and is that of the wife. *Ramsay v. Margrett*, (1894) 2 Q. B. 18, C. A.; see *Antoniali v. Smith*, (1901) 2 K. B. 589, C. A.

A bill of sale of goods, followed by open delivery and possession, *Piercy v. Humphreys*, 17 L. T. 456, H. T. 1868, Stuart, V.-C.; or, of goods not actually in the possession of the assignor at or after the time of execution of process, *Minister v. Price*, 1 F. & F. 686, Willes, J.; requires no registration; unless given as security for money; see B. of S. Act, 1882, s. 8, *ante*, p. 1197.

The B. of S. Act, 1878, s. 6, *ante*, p. 1193, expressly excepts a mining lease. And such lease may contain a power to distrain for rent not only on the mine demised, but on any adjoining or neighbouring collieries. *Lee v. Roundwood Colliery Co.*, (1897) 1 Ch. 373. So it does not avoid the ordinary attornment clause in a mortgage of land, so as to destroy the relation of landlord and tenant thereby created between the mortgagee and mortgagor; *Mumford v. Collier*, 25 Q. B. D. 279; but so far as it gives the mortgagee a power of distress as security for the payment of interest in arrear, it is to be deemed a bill of sale. S. C.; *Ex pte. Kennedy*, 21 Q. B. D. 384, C. A. The proviso applies only where the mortgagee has taken actual possession of the premises and has subsequently demised them to the mortgagor, and not to a case where the demise has been created by the mortgage deed itself. S. C.; *Green v. Marsh*, (1892) 2 Q. B. 330, C. A. Nor is it sufficient that the terms of attornment should have been modified by a subsequent letter from the mortgagor to the mortgagee. S. C.

The B. of S. Act, 1878, s. 8, *ante*, p. 1194, and the B. of S. Act, 1882, s. 8, *ante*, p. 1197, require that the bill of sale shall be duly attested and registered. The attestation of bills of sale under the B. of S. Act, 1878, is regulated by sect. 10 (1), *ante*, p. 1194, and that under the B. of S. Act, 1882, by sect. 10, *ante*, p. 1198. The registration is regulated by the B. of S. Act, 1878, s. 10 (2), *ante*, p. 1194, and the decisions thereon are collected, *post*, pp. 1205 *et seq.* Sect. 8 of each act also enacts that the bill of sale shall set forth the consideration for which it was given. The consideration to be stated, is the sum then

advanced to the grantor, and not necessarily the amount the bill of sale was given to secure. *Ex pte. Challinor*, 16 Ch. D. 260, C. A. Thus, where, in addition to a present advance, the bill of sale is given to secure a sum advanced under a prior mortgage, it is not necessary that the latter sum should be correctly stated. S. C. It is sufficient to state the consideration, at it would properly have been stated, independently of the act; and it is not necessary to state a collateral agreement between the grantor and grantee as to its application, e.g., in payment of a previously existing debt from the grantor to the grantee. *Ex pte. National Mercantile Bank*, 15 Ch. D. 42, C. A.; *Ex pte. Bolland*, 21 Ch. D. 543, C. A.; *Ex pte. Challinor*, *supra*, explained in *Ex pte. Rolph*, 19 Ch. D. 98, C. A.; and *Ex pte. Firth*, *Id.* 419, C. A. See also *Thomas v. Scarles*, (1891) 2 Q. B. 408, C. A. So, moneys paid at the request of the grantor may, in the absence of *mala fides*, be stated to be paid to him. *Hamlyn v. Beteley*, 5 C. P. D. 327. See also *Ex pte. Hunt*, 13 Q. B. D. 36. It is sufficient if it appear from the terms of the instrument what the consideration really was. *Roberts v. Roberts*, *Id.* 794, C. A. And it is not necessary that the money stated as the consideration should actually pass, an allowance in account is sufficient. *Credit Co. v. Pott*, 6 Q. B. D. 295, C. A.; *Ex pte. Nelson*, W. N. 1887, p. 7, C. A.; *Ex pte. Johnson*, 26 Ch. D. 338, C. A. But where the grantor owed the grantee 40*l.*, who then advanced him a further 50*l.*, on the terms that a bill of sale should be given for both amounts, and the consideration was therein stated to be "the sum of 90*l.* now due and owing," this was held to be untrue. *Davies v. Jenkins*, (1900) 1 Q. B. 133. So where part of the advance, stated in the bill of sale as the consideration therefor, is retained by the grantee for sums not due from the debtor, at the time of the execution thereof, e.g., for interest, or costs, or other expenses incurred in the preparation of the bill of sale, so that the statement as to the amount of the advance is a mere sham, sect. 8 is not satisfied. *Hamilton v. Chaine*, 7 Q. B. D. 319 C. A.; *Ex pte. Charing Cross, &c. Bank*, 16 Ch. D. 35, C. A.; *Ex pte. Firth*, *supra*; *Richardson v. Harris*, 22 Q. B. D. 268, C. A. But the payment of costs out of the money actually advanced will not avoid the transaction, where it has not been made in pursuance of an agreement antecedent to the bill. *Saunders v. White*, (1901) 1 K. B. 70. No opinion on this point was expressed in S. C. (1902) 1 K. B. 472, C. A. An agreement to pay a sum of money at a future date, is not sufficiently described as a sum paid at or before the execution of the deed. *Ex pte. Rolph*, *supra*. So the surrender of a promissory note for 16*l.*, payable by the grantor to the grantee, by instalments not due, cannot be treated as a cash payment of 16*l.* *Darlow v. Bland*, (1897) 1 Q. B. 125, C. A. It is not sufficient that the receipt at the foot of the deed should explain the transaction. *Ex pte. Charing Cross, &c. Bank*, *supra*. So a bill of sale is void if it do not on its face show the real agreement, but is dependent for its effect on some other document. *Sharp v. Brown*, 38 Ch. D. 427. But a prior agreement that the money, which was in fact paid by the grantee E., should be in part applied by the grantor, W., to the retirement of a promissory note then current, on which E. and W. were both liable, need not be stated. *Ex pte. Eguon*, (1900) 1 Q. B. 96. Where a bill of sale executed to secure an actual advance of 1,500*l.* was found to be void owing to some of its clauses, and a new bill of sale was four days afterwards made in substitution therefor, the consideration of the latter was held to be truly stated as "1,500*l.* now paid." *Ex pte. Allam*, 14 Q. B. D. 43. See *Ex pte. Tweedale*, (1892) 2 Q. B. 216. A collateral agreement not to register the bill of sale need not be stated therein. *Ex pte. Popplewell*, 21 Ch. D. 73, C. A. The B. of S. Act, 1878, s. 8, applies to absolute bills of sale. *Tuck v. Southern Counties Deposit Bank*, 42 Ch. D. 471, C. A.

No registration is necessary under the B. of S. Act, 1878, s. 8, or the B. of

S. Act, 1882, s. 8, *ante*, pp. 1194, 1197, where goods are seized under a *fi. fa.* within 7 clear [see B. of S. Act, 1878, s. 10 (2), and B. of S. Act, 1882, s. 8] days after the making of the bill of sale. *Marples v. Hartley*, 3 E. & E. 610; 30 L. J., Q. B. 92. And, under similar circumstances, imperfect registration will not impair its effect. *Banbury v. White*, 2 H. & C. 300; 32 L. J., Ex. 258. An unregistered bill of sale under the B. of S. Act, 1878, is void only as against the persons mentioned in sect. 8, and is good against the grantor. *Davis v. Goodman*, 5 C. P. D. 128, C. A. But a bill of sale under the B. of S. Act, 1882, if unregistered is altogether void by sect. 8, *ante*, p. 1197.

Under the B. of S. Act, 1878, the grantee of an unregistered bill of sale is allowed in bankruptcy, as against the grantor's trustee, a charge on the goods to the amount of prior charges, which would have been valid against the trustee, and which have been paid off by the grantee, as in the case of an execution on the goods; *Ex pte. Mutton*, L. R., 14 Eq. 178; or, of a prior registered bill of sale thereon; *Ex pte. Harris*, L. R., 19 Eq. 253; and this principle would seem to apply at law. See *Fawcett v. Fearne*, 6 Q. B. 20, 30.

The B. of S. Act, 1878, s. 8, avoids an unregistered bill of sale as against an execution creditor, so far only as is necessary to satisfy the execution. *Ex pte. Blaiberg*, 23 Ch. D. 254, C. A. Where, therefore, the grantee of an unregistered bill of sale has taken possession during the execution and before bankruptcy, and the execution is avoided by bankruptcy, the title of the holder of the bill of sale becomes effectual. S. C. The B. of S. Act, 1882, s. 8, however, avoids altogether a bill of sale given as security for money unless it is registered. See *Heseltine v. Simmons*, (1892) 2 Q. B. 547, *post*, p. 1211.

Under the B. of S. Act, 1878, s. 10, *ante*, p. 1194, successive registered bills of the same chattels have priority in the order of their dates of registration. Hence the grantee of a registered bill of sale has priority over the grantee, under an earlier unregistered bill; *Connelly v. Steer*, 7 Q. B. D. 520, C. A.; even although the latter went into possession under his bill of sale. *Lyons v. Tucker*, *Id.* 523.

Where goods, formerly belonging to A., are by an unregistered bill of sale vested in B. as trustee for C., with power of sale, a registered bill of sale by C., with B.'s concurrence, to D., is void as against the execution creditor of A., who had remained in apparent possession of the goods. *Chapman v. Knight*, 5 C. P. D. 308.

The rights of the execution creditor are not affected by notice of an unregistered bill of sale. *Edwards v. Edwards*, 2 Ch. D. 291, C. A.

Where A. & B. being joint tenants of chattels give a bill of sale of them which is not registered, and A. alone becomes bankrupt, the bill of sale is void as to A.'s moiety only. *Ex pte. Brown*, 9 Ch. D. 389, C. A.

The mortgagee of goods under a registered bill of sale cannot tack a prior mortgage of other property of the mortgagor, so as to defeat an execution creditor who has seized the goods. *Chesworth v. Hunt*, 5 C. P. D. 266.

An unregistered bill of sale given by a company, was not void as against the liquidator of the company when it is afterwards wound up. *In re Marine Mansions Co.*, L. R., 4 Eq. 601. Nor is it so under the J. Act, 1875, s. 10, *ante*, p. 308. See *In re Count D'Epineuil*, 20 Ch. D. 217. Nor does that section make an unregistered bill of sale void against the unsecured creditors of the insolvent estate of the grantor. S. C. See further *ante*, p. 1162. But under the B. of S. Act, 1882, s. 8, *ante*, p. 1197, any unregistered bill of sale, given as security for money, is void; *Attenborough's case*, 28 Ch. D. 682; even as against the grantor. *Ex pte. Parsons*, 16 Q. B. D. 532, 545, 546, *per* C. A. Registered debentures of a company are not within the B. of S. Acts, *vide post*, pp. 1214-5. As to the registration of mortgages, &c., under 63 & 64 V. c. 48, s. 14 (1), created by a Company after Jan. 1st, 1901, *vide post*, p. 1215.

The B. of S. Act, 1878, s. 8, avoids bills of sale as to goods in the apparent

possession of the grantor at the time of the filing of the petition for bankruptcy, and there is no relation back for the purpose of avoiding the bill of sale; and by sect. 20, *ante*, p. 1196, goods comprised in a registered bill of sale are not within the reputed ownership of the grantor of the bill of sale. See hereon, *Ex pte. Kahen*, 21 Ch. D. 871. But these sections are repealed as to bills of sale given as security for money, *vide ante*, pp. 1196, 1198, and such bills of sale are void if unregistered, under B. of S. Act, 1882, s. 8. The B. of S. Acts override the protecting provisions of the Bky. Act, 1883, s. 49. See *Ex pte. Attwater*, 5 Ch. D. 27, C. A.

Under the B. of S. Act, 1878, s. 9, *ante*, p. 1194, a bill of sale executed within or on the expiration of 7 days after the execution of a prior unregistered bill of sale, is void in so far as it comprises goods in the prior bill of sale, unless the second bill was made for the *bonâ fide* purpose of correcting a material error in the prior bill. But this section does not avoid a bill of sale given in pursuance of a prior oral agreement. *Ex pte. Hauxwell*, 23 Ch. D. 626, C. A.

Bills of sale executed on or after Jan. 1st, 1879, must [sects. 8, 10 (1), *ante*, p. 1194] have been attested by a solicitor. And these sections are still in force as to bills of sale not given as a security for money. *Cusson v. Churchley*, 53 L. J., Q. B. 335. By the B. of S. Act, 1882, s. 10, *ante*, p. 1198, this provision is, however, repealed as to bills of sale given as security for money, executed on or after Nov. 1st, 1882, but such bills must be attested by one or more credible witnesses, not being a party or parties thereto. Bills of sale can therefore only be proved by calling the attesting witness: *vide ante*, p. 132; or by means of an office copy under B. of S. Act, 1878, s. 16, *ante*, p. 1196. In the case of bills of sale not given as security for money, the attestation must *state* that before the execution of the bill of sale the effect thereof was explained to the grantor by the attesting witness; but the act does not require that such explanation should, in fact, have been given. *Ex pte. National Mercantile Bank*, 15 Ch. D. 42, C. A. Where the grantee is a solicitor, attestation by him is insufficient; *Seal v. Claridge*, 7 Q. B. D. 516, C. A.; but the solicitor of the grantee may attest. *Pennwarden v. Roberts*, 9 Q. B. D. 137. As to bills of sale executed prior to Jan. 1st, 1879, it seems there is no occasion, notwithstanding the terms of the B. of S. Act, 1854, s. 1, for a bill of sale to be attested; it may, therefore, be proved without calling the attesting witness, even if there be one; *vide ante*, p. 132.

The registration will not be avoided by merely clerical errors in the copy filed, which could not mislead. *Ex pte. Kahen, supra*; *Sharp v. Brown*, 38 Ch. D. 427; and blanks may be supplied by reference to the affidavit filed; *Thomas v. Roberts*, (1898) 1 Q. B. 657; *Coates v. Moore*, (1903) 2 K. B. 140, C. A.

The B. of S. Act, 1878, s. 10 (2), *ante*, p. 1194, requires the *original* bill of sale to be registered. Hence if the bill be destroyed before registration, registration is impossible, and the bill of sale will be void under the circumstances mentioned in sect. 8, *ante*, p. 1194, or under the B. of S. Act, 1882, s. 8, *ante*, p. 1197. It also requires the registration of every schedule or inventory annexed or referred to in the bill of sale, but this does not include that of a catalogue referred to in the schedule. *Davidson v. Carlton Bank*, (1893) 1 Q. B. 82, C. A.

The affidavit required by sect. 10 (2), and not the bill only, must contain the description of the residence and occupation of the grantor; *Hutton v. English*, 7 E. & B. 94; 26 L. J., Q. B. 161; and also of the attesting witness; *Brodrick v. Sculé*, L. R., 6 C. P. 98; and, of every one, if more than one. *Nicholson v. Cooper*, 27 L. J., Ex. 393. An attesting witness's description of himself as deponent is sufficient. S. C.; *Foulger v. Tylor*, 5 H. & N. 202;

S. C., *sub nom.* *Wilcoxon v. Searby*, 29 L. J., Ex. 154; *Blauiberg v. Parke*, 10 Q. B. D. 90; see *Ex pte. Lowenthal*, L. R., 9 Ch. 324. Where the affidavit refers to the bill of sale, any deficiency in the descriptions may be supplemented thereby; *Jones v. Harris*, L. R., 7 Q. B. 157; *Routh v. Roublot*, 1 E. & E. 850; 28 L. J., Q. B. 240; unless the one contradict the other. *Murray v. Mackenzie*, L. R., 10 C. P. 625. And if the affidavit do not refer to the bill of sale, the description in the latter cannot, of course, be used to supplement the affidavit. *Pickard v. Bretz*, 5 H. & N. 9; 29 L. J., Ex. 18. The statute does not expressly provide that the affidavit shall state the name of the grantor: if his real name is stated, it is no objection to the registration that he is usually known by another name; *Ex pte. McHattie*, 10 Ch. D. 398, C. A.; *Stokes v. Spencer*, (1900) 2 Q. B. 483; and the bill of sale is not avoided if the grantor's name be, without the knowledge of the grantee, intentionally misstated. *Downs v. Salmon*, 20 Q. B. D. 775. Where there were joint grantors, of whom A. alone was bankrupt, it was sufficient, under the B. of S. Act, 1878, if the affidavit was correct as to A. only. *Ex pte. Popplewell*, 21 Ch. D. 73, C. A.

The object of the statute is to require the residence to be stated so fully, that persons, about to give credit, may have sufficient information to guide them as to the identity of the man they intend to trust, and consequently his residence should be described with, not too minute, but reasonable certainty and sufficiency. *Hewer v. Cor*, 3 E. & E. 428, 433; 30 L. J., Q. B. 73, 75, *per* Wightman, J.; *Jones v. Harris*, *supra*; *Ex pte. McHattie*, *supra*. See also *Thorpe v. Browne*, L. R., 2 H. L. 220; and *Briggs v. Boss*, L. R., 3 Q. B. 268. Thus, where the grantor resided at A., and carried on business there, and at B. and C., it was held sufficient to state his residence at A. *Greenham v. Child*, 24 Q. B. D. 29. Where the residence is sufficiently stated, an erroneous addition thereto, not calculated to mislead, is immaterial. *Hewer v. Cor*, *supra*; *Blount v. Harris*, 4 Q. B. D. 603. The place of business of the witness, or of his employer, if he be a clerk, is sufficient. *Attenborough v. Thompson*, 2 H. & N. 559; 27 L. J., Ex. 23; *Blackwell v. England*, 8 E. & B. 541; 27 L. J., Q. B. 124; *Simmons v. Woodward*, (1892) A. C. 100, D. P. "A man may fairly be said to reside where he is to be found daily." *Ex pte. Breull*, 16 Ch. D. 484, 487, *per* James, L.J. The description in the affidavit is to be that appropriate at the time of the *filing* of the bill of sale, and not of the *making*. *Button v. O'Neill*, 4 C. P. D. 354, C. A. Where the proper description had changed between those two periods, the affidavit of the latter description was held to be sufficient, although framed in the present tense. S. C. See *Ex pte. Kahan*, 21 Ch. D. 871. Sect. 10 (2) also requires the occupation of the grantor to be stated in order that he may be identified. *Sharp v. Brown*, 38 Ch. D. 427. Where he had carried on the occupation of a contractor and financial agent, it was held that he was properly so described, although not then actively engaged in such business. S. C. Where the grantor was a commercial traveller at the time of making the bill of sale, it was held insufficient to describe him as "until lately" a commercial traveller. *Castle v. Downton*, 5 C. P. D. 56. It is not a sufficient description of the occupation of the assignor, if he have any office or occupation, to term him simply "gentleman"; *Allen v. Thompson*, 1 H. & N. 15; 25 L. J., Ex. 249; *Adams v. Graham*, 33 L. J., Q. B. 71; *Ex pte. Hooman*, L. R., 10 Eq. 63; *Brodrick v. Scalé*, *ante*, p. 1205; but, if termed only "gentleman," it lies on the party impugning the bill to show some occupation; *Sutton v. Bath*, 3 H. & N. 382; S. C., *sub nom.* *Bath v. Sutton*, 27 L. J., Ex. 388; *Smith v. Cheese*, 1 C. P. D. 60; a person who has never had an occupation; *Gray v. Jones*, 14 C. B., N. S. 743; or, who is out of employment; S. C.; *L. & Westminster Loan, &c., Co. v. Chase*, 12 C. B., N. S. 730; 31 L. J., C. P.

314; *Morewood v. S. Yorkshire Ry., &c. Co.*, 3 H. & N. 798; 28 L. J., Ex. 114; *Smith v. Cheese*, *ante*, p. 1206; may be so described. The term "gentleman" is not a sufficient description of a solicitor's clerk; *Beales v. Tennant*, 29 L. J., Q. B. 188; *Brodrick v. Scalé*, *ante*, p. 1205; even though he had previously been a solicitor; *Tuton v. Sanoner*, 3 H. & N. 280; 27 L. J., Ex. 293. The description "gentleman of no occupation" is sufficient, although the grantor is a dormant partner in several firms. *Peast v. Robinson*, 63 L. J., Ch. 321. A shipbroker is sufficiently described as a broker. *Gugen v. Sampson*, 4 F. & F. 974; *cor.* Channell, B. So, a clerk in the Admiralty, as a "government clerk." *Grant v. Shaw*, L. R., 7 Q. B. 700. Where a description is *prima facie* sufficient, it lies on the person seeking to impugn it, to show that the party or witness is not what he is described. S. C.; *Sutton v. Bath*, *ante*, p. 1206. As to the description of "accountant," see *Briggs v. Boss*, *ante*, p. 1206, and *Larchin v. N. W. Deposit Bank*, L. R., 8 Ex. 80; L. R., 10 Ex. 61, Ex. Ch. A schoolmaster is insufficiently described as "tutor." *Lee v. Turner*, 20 Q. B. D. 773. The description of C. B., "as wife of A. B.," is insufficient if C. B. have any occupation. *Kemble v. Addison*, (1900) 1 Q. B. 430. As to what signatures are those of attesting witnesses in a bill of sale granted by a joint-stock company, see *Shears v. Jacob*, L. R., 1 C. P. 513, and *Deffel v. White*, L. R., 2 C. P. 144, cited *ante*, p. 131. An objection as to the sufficiency of the affidavit must be taken at the trial, or it cannot be raised afterwards. *Bath v. Sutton*, 27 L. J., Ex. 388. It is sufficient if the affidavit describe the residence and description of the grantor, to the "best of the belief" of the deponent. *Roe v. Bradshaw*, L. R., 1 Ex. 106. The bill of sale and the affidavit are to be filed at the same time. *Grindell v. Brendon*, 6 C. B., N. S. 698; 58 L. J., C. P. 333.

In the case of bills of sale not given as security for money, and therefore under the B. of S. Act, 1878, s. 10 (1), *vide ante*, p. 1194, the affidavit must state that the attesting solicitor was present and witnessed the due execution of the bill of sale; it is insufficient if it merely verify his signature to the attestation clause. *Ford v. Kettle*, 9 Q. B. D. 139, C. A.; *Sharpe v. Birch*, 8 Q. B. D. 111. It need not, however, state that the bill of sale was explained to the grantor by the attesting witness. *Ex pte. Bolland*, 21 Ch. D. 543, C. A.

Under Rules, 1883, O. xxxviii. r. 16, "No affidavit shall be sufficient if sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before any agent or correspondent of such solicitor, or before the party himself." R. 17: "Any affidavit which would be insufficient if sworn before the solicitor himself shall be insufficient if sworn before his clerk, or partner." These rules apply to the affidavit required by the B. of S. Acts, and unless it complies with these the registration is void. *Baker v. Ambrose*, (1896) 2 Q. B. 372. The commissioner before whom the affidavit was sworn need not describe himself as such in the jurat. *Ex pte. Johnson*, 26 Ch. D. 338, C. A.

The B. of S. Act, 1878, ss. 8, 10 (2), and *Id.*, 1882, s. 8, *ante*, pp. 1194, 1197, allows 7 clear days for registration, and sect. 22, *ante*, p. 1196, provides that if the registrar's office be closed on the last day for registration, registration on the next day on which the office is open shall be valid. The B. of S. Act, 1878, s. 14, *ante*, p. 1195, gives power to a judge to extend the time for registration, or to allow the correction of any error or omission in the register, provided the omission or error was accidental or due to inadvertence.

A parol agreement for defeasance, enforceable in equity and not expressed in the bill of sale, will under B. of S. Act, 1878, s. 10 (3), *ante*, p. 1195, render void, as against execution creditors, &c., the bill of sale in respect of

the personal chattels comprised therein. *Ex pte. Southam*, L. R., 17 Eq. 578. Thus an oral agreement, made prior to the execution of the bill of sale, that the grantee shall not enforce the bill of sale if the debt for which it stands security is paid by instalments, avoids it. S. C. See *Heseltine v. Simmons*, (1892) 2 Q. B. 547, C. A., *post*, p. 1211. So where a bill of sale was given to secure the repayment of 80*l.*, and interest thereon at 30 per cent., the whole being repayable by equal monthly instalments of 5*l.* 6*s.* on specified days, and the grantor at the same time gave a separate promissory note, promising to pay the grantees 95*l.* 12*s.* by equal monthly instalments of 5*l.* 6*s.*, on the same days, until 95*l.* 12*s.* should be paid, the whole to become payable on default of payment of any instalment, it was held that as on such default, and payment of the note in full, the grantees' rights under the bill of sale would cease, the note was a defeasance thereof, and the bill of sale was therefore void. *Counsell v. L. & Westminster Loan, &c. Co.*, 19 Q. B. D. 512, C. A.; *accord. Edwards v. Marcus*, (1894) 1 Q. B. 587, C. A.; see also *Sharp v. Brown*, 38 Ch. D. 427. The note is, however, good. *Monetary Advance Co. v. Cater*, 20 Q. B. D. 785. It is immaterial whether the condition or defeasance is in favour of the grantor, or the grantee. *Edwards v. Marcus*, *supra*, explaining *Ex pte. Collins*, L. R., 10 Ch. 367, and dissenting from the *dictum* of James, L.J., *Id.* p. 372, therein. The deposit of a policy of insurance as collateral security without any written memorandum does not constitute a condition or defeasance of the bill of sale within sect. 10 (3). *Carpenter v. Deen*, 23 Q. B. D. 556, C. A. Nor does the written guarantee of a third person. *Oakes v. Green*, 23 T. L. R. 560. Where the grantee under the bill of sale is trustee for a third person in no way connected with the grantor, it is not necessary that this fact should be disclosed on the bill of sale. *Robinson v. Collingwood*, 17 C. B., N. S. 777; 34 L. J., C. P. 18. An oral agreement that the grantor of a bill of sale should pay off the amount due under it out of a larger advance to be made by the same grantee under a second bill of sale on the same goods is not within sect. 10 (3). *Thomas v. Searles*, (1891) 2 Q. B. 408, C. A. As to a condition attempted to be imposed by the grantee after the execution of the bill of sale, see *Linfoot v. Pockett*, (1895) 2 Ch. 835, C. A. See further as to what is a condition, &c., within sect. 10 (3) *Ex pte. Collins*, *supra*; *Ex pte. Popplewell*, 21 Ch. D. 73, C. A. Oral evidence is admissible to prove the defeasance, &c. *Edwards v. Marcus*, *supra*, following *In re Watson*, *ante*, p. 1200.

Sect. 10, *ante*, pp. 1194, 1195, applies to absolute bills of sale as well as those given by way of security only, so that their priority depends on the order of registration. *Tuck v. Southern Counties Deposit Bank*, 42 Ch. D. 471, C. A. But as regards bills of sale given as security for money, sub-sect. 1 is replaced by the B. of S. Act, 1882, s. 10, *ante*, p. 1198. A transfer or assignment by the grantee of a registered bill of sale need not be registered; see *Horne v. Hughes*, 6 Q. B. D. 676, C. A.; nor a memorandum by way of equitable sub-mortgage given by him. *Ex parte Turquand*, 14 Q. B. D. 636, C. A.

The registration becomes void, unless renewed every five years, under sect. 11, *ante*, p. 1195. The affidavit required thereby must strictly follow the terms of the section. *Ex parte Webster*, 21 Ch. D. 136, C. A. Thus the residence of the grantee must be stated as in the bill of sale, although there erroneously stated. S. C. If the registration of an absolute bill of sale has lapsed, the grantee can make a good title to the goods granted, before any of the persons arise against whom the bill of sale would be void under sect. 8, *ante*, p. 1194; and this title is not displaced by a subsequent *fi. fa.* against the grantor, for the effect of the bill of sale has become entirely spent. *Antoniadis v. Smith*, (1901) 2 K. B. 589, C. A., following *Cookson v. Swire*, 9 Ap. Ca. 653, D. P. Where, however, the bill of sale has been given

as a security for money, and so falls under the Bills of Sale Act, 1882, it becomes void even, as between grantor and grantee, when the registration has lapsed. *Fenton v. Blythe*, 25 Q. B. D. 417. And in the case of such a bill of sale the assignee must renew the registration just as the original grantee must have done. *Karet v. Kosher Meat Supply Assoc.*, 2 Q. B. D. 361.

The register kept under sect. 12, *ante*, p. 1195, is a public book, and a certified copy is evidence of time of filing a bill of sale, and therefore of the requisite affidavit. See *Grindell v. Brendon*, 6 C. B., N. S. 698; 28 L. J., C. P. 333; *Emmott v. Marchant*, 3 Q. B. D. 555, 558, *per* Lush, J. In *Mason v. Wood*, 1 C. P. D. 63, however, a certificate that a bill of sale had been filed, was held insufficient to prove that the affidavit had been filed, on the ground, apparently, that the section did not direct the officer not to file the bill of sale without the affidavit. See further, *ante*, p. 43. In *Emmott v. Marchant*, *supra*, it was held that a certificate that the bill of sale had been filed, did not obviate the necessity of producing the filed copy of the bill, in order to prove that it was a true copy of the bill of sale, proved to have been executed. Having regard to the opinions expressed in these cases, it will, in order to prove registration, be prudent to produce an office copy of the bill of sale and of the affidavit, which, by sect. 16, *ante*, p. 1196, are evidence thereof, and of the fact and date of registration as shown thereon. The affidavit could also be proved under Rules, 1883, O. xxxvii., r. 4, *ante*, p. 97, or under 14 & 15 V. c. 99, s. 14, *ante*, p. 101, by an office copy. *Bath v. Sutton*, 27 L. J., Ex. 388.

A judge can, under sect. 14, *ante*, p. 1195, allow the amendment of such defects only as appear on the register; thus, where the affidavit filed under sect. 10 (2), *ante*, p. 1194, omits to state the residence and description of the attesting witness, the judge cannot allow this to be supplied by a supplementary affidavit. *Crew v. Cummings*, 20 Q. B. D. 535; 21 *Id.* 420, C. A. Nor can he extend the time for registration under the section, so as to defeat the vested title of an execution creditor. S. C., in C. A.; or of a trustee in bankruptcy. *Ex parte Furber*, (1893) 2 Q. B. 122, C. A.

A bill of sale, void for want of renewal of registration at the commencement of the B. of S. Act, 1878, cannot be renewed under sect. 14 (*ante*, p. 1194). *Askew v. Lewis*, 10 Q. B. D. 477; *In re Emery*, 21 Q. B. D. 405, C. A.

By the B. of S. Act, 1882, s. 3, *ante*, p. 1196, this act applies only to bills of sale, given as security for the payment of money; hence in the case of a bill of sale given by way of absolute transfer, the B. of S. Act, 1878, is in force in its entirety, notwithstanding the B. of S. Act, 1882, ss. 10, 15, *ante*, p. 1198. *Swift v. Pannell*, 24 Ch. D. 210; *Reeves v. Barlow*, 11 Q. B. D. 610; *Casson v. Churchley*, 53 L. J., Q. B. D. 335. And by sect. 3, the protection of the B. of S. Act, 1878, s. 20, *ante*, p. 1196, is preserved in favour of the grantee of a bill of sale registered under that act, so long as the registration is subsisting. *Ex parte Izard*, 23 Ch. D. 409, C. A.

Sect. 4, *ante*, p. 1196, requires an inventory of the chattels comprised in the bill of sale, which inventory must specifically describe them "as is usual in such inventories as are usually made for business purposes with regard to the particular subject-matter." *Witt v. Banner*, 20 Q. B. D. 114, 118, C. A.; *Davidson v. Carlton Bank*, (1893) 1 Q. B. 82, 86, 87; *Roberts v. Roberts*, 13 Q. B. D. 794, C. A. The description "household furniture and effects, implements of husbandry," S. C.; or "21 milch cows," *Carpenter v. Deen*, 23 Q. B. D. 566, C. A.; *Davies v. Jenkins*, (1900) 1 Q. B. 133; or "450 oil paintings in gilt frames, 300 oil paintings unframed," *Witt v. Banner*, *supra*, is insufficient. Where the inventory is insufficient, the bill of sale is void (except as against the grantor), but so far as regards the chattels not so described, only; *Roberts v. Roberts*, *supra*; for sects. 4, 5, avoid so

much of the schedule to the bill of sale only as is imperfect. See *Kelly v. Kellond*, 20 Q. B. D. 569, 574, 575, *per* Fry and Lopes, L.JJ. A bill of sale is not void on the ground that it does not state the house or place where the goods are situated. *Ex pte. Hill*, 17 Q. B. D. 74. In order to succeed on the objection that the inventory is insufficient, the objector must either show that from the nature of the description, or in the particular case, the goods cannot be identified. *Hickley v. Greenwood*, 25 Q. B. D. 277. Where the schedule commenced, "The whole of the chattels at present at W. Vicarage and consisting *inter alia* of the following," and then proceeded to specify the furniture, &c., in each room in the house, and one heading was as follows, "Study: 1800 volumes of books as *per* catalogue," and there was an existing catalogue of the books in the room, it was held that the books were "specifically described," the words "as *per* catalogue" not being restrictive. *Davidson v. Carlton Bank*, (1893) 1 Q. B. 82, C. A.

In sect. 5, *ante*, p. 1196, the term "true owner" means the legal owner, irrespective of whether he is also the equitable owner, or only trustee for another. *Ex pte. Williams*, (1892) 2 Q. B. 591. This section avoids a bill of sale of goods given to C. as a security for money by A., who had previously absolutely assigned the same goods by an unregistered bill of sale to B. as a gift, for A. was not true owner of the goods when they were assigned to C. *Tuck v. Southern Counties Deposit Bank*, 42 Ch. D. 471, C. A. But where the first bill of sale was by way of security only, A remains the true owner, and can execute a subsequent valid bill of sale of the same goods. *Thomas v. Searles*, (1891) 2 Q. B. 408, C. A.

In sect. 6 (1), *ante*, p. 1196, "growing crops, separately assigned," means assigned separately from the land on which they are growing, and a bill of sale assigning them together with chattels is valid. *Roberts v. Roberts*, *ante*, p. 1209. In sect. 6 (2) "plant" means something used on the land; horses used as cab-horses are not within it. *L. & E. Counties Loan, &c. Co. v. Creasey*, (1897) 1 Q. B. 768, C. A.

By sect. 7, *ante*, p. 1197, personal chattels assigned under a bill of sale, given as security for money, can be seized for certain enumerated causes only, and for the breach of any agreement "necessary for maintaining the security;" if it give licence to seize on any other grounds, the bill of sale is void by sect. 9; *vide ante*, p. 1197. As to the effect of sect. 7 on the grantee's right of possession, see *Johnson v. Diprose*, (1893) 1 Q. B. 512, C. A. Where the bill of sale provides that the debt shall be repayable by monthly instalments, the grantee may seize the whole of the goods on failure to pay any one instalment. *Ex pte. Woolfe*, (1894) 1 Q. B. 605.

A covenant to pay premium for fire insurance, on goods comprised in the security, and to produce, and if required, deliver the receipt to the grantee, is necessary for maintaining the security within sect. 7 (1). *Hammond v. Hocking*, 12 Q. B. D. 291. There is no failure by the grantor, without reasonable excuse, within sect. 7 (4), to produce his last receipt for rent, when the landlord has not required payment. *Ex pte. Wickens*, (1898) 1 Q. B. 543, C. A. This was decided irrespectively of the fact that the clause specifies the "last receipt" only, not the "receipt for the rent which last fell due." A demand to send the receipt by post to the grantee is not a demand within sect. 7 (4). S. C. A condition that on failure of the grantor to insure, the grantee may insure, and the premiums and interest thereon shall be a charge on the property, is valid. *Ex pte. Stanford*, 17 Q. B. D. 259, C. A.; *Goldstrom v. Tallerman*, 18 Q. B. D. 1, C. A. So in the case of rent and taxes, assessments, and outgoings, paid by the grantee. S. C. If, however, such sums are recoverable by seizure of the goods, the bill of sale is void. *Bianchi v. Offord*, 17 Q. B. D. 484; *Real and Personal Advance Co. v. Glars*, 20 Q. B. D. 304, C. A. As to the effect of the proviso in the

schedule form, *ante*, pp. 1197, 1198, n., in qualifying the bill of sale so as to bring it within the terms of sect. 7, *vide post*, pp. 1213, 1214. Sect. 7 applies to goods seized after Nov. 1st, 1882, under a bill of sale executed and registered before that date. *Ex pte. Cotton*, 11 Q. B. D. 301.

Sect. 8 requires the bill of sale to be attested and registered, *vide ante*, pp. 1205 *et seq.*, and also to set forth the consideration; as to the statement of the consideration thereby required, *vide ante*, pp. 1202, 1203. Where this section has not been complied with, the bill of sale is only "void in respect of the personal chattels comprised therein," any covenant remains in force. *Heseltine v. Simmons*, (1892) 2 Q. B. 547, C. A. It applies where the bill of sale is given on a condition not stated therein. S. C.

Sect. 9 avoids any instrument given as a security for money, which is a bill of sale within the B. of S. Act, 1878, s. 4, *ante*, p. 1192, and not within the B. of S. Act, 1891, s. 1, *ante*, p. 1198; unless substantially in the simple form given in the schedule to the act, *ante*, p. 1197, n.; *Davis v. Burton*, *infra*; *Hughes v. Little*, 18 Q. B. D. 494, C. A.; *Furber v. Cobb*, *Id.* 494, C. A.; even although its terms do not contravene any other provisions of the act; *Melville v. Stringer*, 13 Q. B. D. 392, C. A.; and although its nature is such, as in the case of a licence to seize goods, that it cannot be expressed in the schedule form. *Ex pte. Parsons*, 16 Q. B. D. 532, C. A. See *Thomas v. Kelly*, 13 Ap. Ca. 506, 511, *per* Ld. Halsbury, C. Thus a bill of sale given by two grantors not jointly interested in any of the goods, but each owning a part in severalty is void. *Saunders v. White*, (1902) 1 K. B. 472, C. A. The omission of the address of the grantee is fatal. *Altrec v. Altrec*, (1898) 2 Q. B. 267. Where a bill of sale is expressed to be "between H. of the one part, and the Discount Bank of London, 6, Duncannon Street, &c. (of which said bank, L. S. of the same place is the sole proprietor), of the other part," this is a sufficient description of the name of the grantee. *Simmons v. Woodward*, (1892) A. C. 100, D. P. A bill of sale need not state the actual residence or place of business of the grantor; the insertion, after his name, of the address of his club where letters would reach him, is sufficient. *Dolcini v. Dolcini*, (1895) 1 Q. B. 898. But a bill of sale is void unless the address and description of the attesting witness are stated thereon; *Parsons v. Brand*; *Coulson v. Dickson*, 25 Q. B. D. 110, C. A.; even although he has no occupation. *Sims v. Trollope*, (1897) 1 Q. B. 24, C. A. But where the execution by two grantors was attested in separate clauses, by the same witness, who signed his name, and stated his address and description in the first clause, and signed his name only in the second, and it clearly appeared that the signatures were by the same person, the attestation was held sufficient. *Bird v. Davey*, (1891) 1 Q. B. 29, C. A. A bill of sale, void under sect. 9, is void altogether, even as to covenants for repayment of principal and interest. *Davies v. Rees*, 17 Q. B. D. 408, C. A. Where its schedule comprises chattels real as well as personal chattels, the bill of sale is void as to the latter by reason of sect. 9. *Cochrane v. Entwistle*, 25 Q. B. D. 116, C. A. But if the security be severable, it is good as to the chattels real. *Ex pte. Byrne*, 20 Q. B. D. 310, C. A. See also *Ex pte. Mason*, (1895) 1 Q. B. 333, C. A. A bill of sale is not void under sect. 9 by reason of the consideration being untruly stated; *Heseltine v. Simmons*, *supra*; nor by reason of the non-statement of a collateral agreement that the bill of sale should not be enforced until certain other securities had been exhausted. S. C. Such agreement is not a "defeasance" within the meaning of the schedule, S. C.; and is valid though not in writing. S. C.

The form given in the schedule requires that a receipt of the advance made, should be acknowledged therein. *Davies v. Jenkins*, (1900) 1 Q. B. 133; and that redemption should be on payment of a fixed sum, and rateable interest thereon; *Davis v. Burton*, 10 Q. B. D. 414; 11 Q. B. D. 537, C. A.;

and the bill of sale must show the rate of interest chargeable; *Blankenstein v. Robertson*, 24 Q. B. D. 543; but not necessarily its amount. *Haslewood v. Consolidated Credit Co.*, 25 Q. B. D. 555, C. A. A bill of sale to secure 300*l.* advanced, and 180*l.* capitalized interest, at the rate of 60 per cent. per annum, together 480*l.*, by instalments, with a proviso that on breach of the covenants all the moneys thereby secured should immediately become payable is therefore void. *Davis v. Burton*, *ante*, p. 1211; *Myers v. Elliott*, 16 Q. B. D. 526, C. A. It is sufficient if the bill state the rate of interest per £ per month; *Lundley v. Simmons*, 34 Ch. D. 698, C. A.; and so if it state times of payment of principal and interest by equal monthly payments of 8*l.*, but in default in any payment the whole principal unpaid, and interest due, to become payable immediately. S. C. So where a bill of sale provided for the repayment of 500*l.* and interest thereon, at the rate of 60 per cent. per annum, and the grantor agreed to pay "the principal sum aforesaid, together with interest then due, by 12 equal monthly payments of 41*l.* 13*s.* 5*d.* until the whole of the said sum and interest shall be fully paid," and that in default of payment of any "instalment" then the grantor would pay interest thereon at the rate aforesaid when such instalment should become due, until full payment therefor, it was held valid because there was no reservation of interest upon interest, the word "instalment" relating only to monthly payments of principal. *Goldstrom v. Tallerman*, 18 Q. B. D. 1, C. A.; *Haslewood v. Consolidated Credit Co.*, 25 Q. B. D. 555, C. A.; *Weardale Coal & Iron Co. v. Hodson*, (1894) 1 Q. B. 598. See also *Edwards v. Marson*, (1891) 1 Q. B. 225, C. A. It is sufficient where a loan of 500*l.* is stated to be paid off "by monthly payments of 30*l.*," although the last instalment will only be 20*l.* *Simmons v. Woodward*, (1892) A. C. 100, D. P. The principal may be payable in one sum; *Watkins v. Evans*, 18 Q. B. D. 386, C. A.; or by unequal instalments. *Ex pte. Rawlings*, *Id.* 489, C. A. So the principal and interest may be paid together by equal weekly instalments extending over an indefinite period, provided interest be not reserved on the instalments, if not duly paid. *Ex pte. Hasluck*, (1894) 1 Q. B. 444; *Linfoot v. Pockett*, (1895) 2 Ch. 835, C. A. See also *Mourmand v. Le Clair*, (1903) 2 K. B. 216, where the instalment was defined by a number only without a monetary denomination.

A bill of sale is void if it contain a covenant to perform the covenants of a recited indenture, those covenants not appearing in the bill of sale. *Lee v. Barnes*, 17 Q. B. D. 77. So a mortgage by one bill of sale to four mortgagees, conditioned for seizure on default of payment of any of the sums secured is void. *Melville v. Stringer*, *ante*, p. 1211. So where the bill of sale provided for the repayment of the sum advanced, and 15*l.* for agreed interest and bonus. *Myers v. Elliott*, *supra*. The amount secured must be made repayable at a fixed stipulated time, and not on demand; S. C.; *Hetherington v. Groome*, 13 Q. B. D. 789, C. A.; nor within a certain number of days after demand; *Sibley v. Higgs*, 15 Q. B. D. 619; nor must there be a power to sell the goods on seizure; *Hetherington v. Groome*, *supra*; nor must the bill of sale provide that the purchaser on a sale, after default made, shall not be bound to inquire whether such default has been made. *Blaiberg v. Parsons*, 17 Q. B. D. 336; *Blaiberg v. Beckett*, 18 Q. B. D. 96, C. A. It is, however, sufficient if the time is stated when payment by the grantor is obligatory. *De Braam v. Ford*, (1900) 1 Ch. 142, C. A. Thus a covenant to pay the principal "on or before" a certain day, is good. S. C.

A bill of sale containing an assignment by the grantor "as beneficial owner," is void, because under it the grantor might by virtue of the Conveyancing, &c. Act, 1881, ss. 2, 7, seize immediately on default. *Ex pte. Stanford*, 17 Q. B. D. 259, C. A. But the power of sale given by *Id.* s. 19, does not apply to a bill of sale in the form given in the schedule to the B. of

S. Act, 1882. *Calvert v. Thomas*, 19 Q. B. D. 204, C. A., overruling the *dictu contra*, in *Watkins v. Evans*, 18 Q. B. D. 386, C. A., and *In re Morrill*, *Id.* 222, C. A. A bill of sale is not invalidated by a provision that the power of sale conferred on the mortgagees by the Conveyancing, &c. Act, 1881, shall be exercisable by them in every respect as if sect. 20 of that act had not been enacted. S. C. Nor by a power to break open doors or windows of premises where the goods may be for the purpose of their seizure. S. C. Nor by declaration of trusts of the moneys produced by the sale of the goods, the trusts being similar to such as would have been implied. *Ex pte. Rawlings*, 18 Q. B. D. 489, C. A. But it is otherwise if the trusts be not such as would have been implied, *e.g.*, that the grantees should be entitled to deduct their full charges and commission as auctioneers conducting the sale on behalf of the grantor; *Furber v. Cobb*, *Id.* 494, C. A., or to deduct "the expenses attending such sale or otherwise incurred in relation to this security." *Calvert v. Thomas*, *supra*.

The bill of sale is valid if substantially in the schedule form. *Roberts v. Roberts*, 13 Q. B. D. 794: *Consolidated Credit, &c. Co. v. Gosney*, 16 Q. B. D. 24. And a bill of sale which has the precise legal effect of the statutory form, and the variance therefrom is not calculated reasonably to deceive, is "in accordance" therewith, and therefore valid. *Ex pte. Stanford*, and *Weardale Coal & Iron Co. v. Hodson*, *ante*, p. 1212. See *Thomas v. Kelly*, 13 Ap. Ca. 506, 519, 520, *per* *Ld. Macnaghten*.

A covenant for further assurance may be inserted as a provision for maintenance of the security. *Ex pte. Rawlings*, *supra*. So is the reservation of a right to retain costs properly incurred in defending and maintaining the security. *Lunley v. Simmons*, *ante*, p. 1212. But it would seem that a clause that, on default of payment, the grantee may take the goods at a valuation avoids the bill of sale. *Lyon v. Morris*, 19 Q. B. D. 139. So does a covenant by the grantor to pay all interest on mortgages, if any, on the premises on which the goods may be; *Watson v. Strickland*, 19 Q. B. D. 391, C. A.; or that the grantee may retain the bill of sale when satisfied, and give a receipt in full only to the grantor. S. C. A power in a bill of sale of household furniture to sell and retain out of the sale money the cost of discharging incumbrances on the property, and of seizing, removing, warehousing and valuing the same are terms for the "maintenance of the security" within the meaning of the schedule form; *Consolidated Credit, &c. Co. v. Gosney*, 16 Q. B. D. 24, and *Furber v. Cobb*, *Ex pte. Rawlings*, *supra*; so is a covenant to replace articles, &c. worn out; *Seed v. Bradley*, (1894) 1 Q. B. 319, C. A.; *Coutes v. Moore*, (1903) 2 K. B. 140, C. A.; such a covenant will not, however, be implied. See *Carpenter v. Deen*, 23 Q. B. D. 566, C. A. Stipulations which are mere surplusage, and do not empower the grantee to seize for the breach of them, may be added to the form. *Ex pte. Stanford*, *ante*, p. 1212; *Topley v. Corsbie*, 20 Q. B. D. 350; see also *Ex pte. Rawlings*, *supra*; and *Cartwright v. Regan*, *post*, p. 1214.

Under sect. 9, *ante*, p. 1197, a bill of sale given as security for the payment of money is void if it gave the grantee licence to seize, on grounds other than those enumerated in sect. 7; *Davis v. Burton*, 10 Q. B. D. 414; 11 Q. B. D. 537, C. A.; *e.g.*, if the grantor shall fail to produce the last receipt for rent, when demanded by the grantee "in writing or otherwise." S. C. Or if the grantor shall render himself liable to become a bankrupt, or "shall remove or suffer the said chattels to be removed," omitting the word fraudulently. *Ex pte. Pearce*, 25 Ch. D. 656. The proviso at the end of the form will not, it seems, prevent a bill of sale from being void on account of a clause containing a power of seizure, not allowed by sect. 7. *Furber v. Cobb*, *supra*. The proviso may, however, qualify the licence to seize expressed in the bill of sale, and so bring it within the terms of sect. 7. Thus, where

the bill of sale contained a licence to seize on non-production of the grantee's last receipt for rent only, the words "without reasonable excuse;" *Weardale Coal & Iron Co. v. Hodson*, (1894) 1 Q. B. 598, C. A.; or "upon demand in writing"; *Cartwright v. Regan*, (1895) 1 Q. B. 900, will be understood, and the bill of sale thus be supported. See also *Ex pte. Ward*, (1899) 2 Q. B. 517. It is sufficient if the bill of sale be executed at the end of the annexed schedule. *Melville v. Stringer*, 12 Q. B. D. 132.

An assignment of chattels specifically described in the schedule together with "all chattels and things which may at any time during the continuance of this security be in or about the same or any other premises of the mortgagor (to which the said chattels or things or any part thereof may have been removed), whether brought there in substitution for or renewal of, or in addition to the things thereby assigned," is void altogether under sect. 9, because not in accordance with the form thereby provided. *Kelly v. Kellond*, 20 Q. B. D. 569, C. A.; affirm. in D. P., *sub nom. Thomas v. Kelly*, 13 Ap. Ca. 506. An essential condition of the deed is that there should be "a present assignment of goods capable of specific description." *Id.* 512, *per* Ld. Halsbury, C. The terms of the deed in this case were distinguished from those of the deed in *Seed v. Bradley*, *ante*, p. 1213, *per* C. A. An instrument which, although not a bill of sale within the B. of S. Act, 1878, s. 4, is, by *Id.* s. 6, "deemed to be a bill of sale," is not within sect. 9. *Green v. Marsh*, (1892) 2 Q. B. 330, 334, *per* C. A. A valid bill of sale, given as security for money, may be executed under a power of attorney of the grantor. *Furnivall v. Hudson*, (1893) 1 Ch. 335.

By the B. of S. Act, 1891, s. 1, *ante*, p. 1198, certain instruments hypothecating imported goods are not to be deemed bills of sale within sect. 9.

A bill of sale for 30*l.*, of which 15*l.* is payable on demand, and 15*l.* by instalments, is not void under sect. 12, *ante*, p. 1198, if 30*l.* be *bond fide* paid by the grantee, although the grantee, at the grantor's request, immediately afterwards demands and is repaid 15*l.*, there being no evidence that the transaction was a sham. *Davis v. Usher*, 12 Q. B. D. 490.

By sect. 13, *ante*, p. 1198, goods seized under a bill of sale may not be removed or sold until after the expiration of 5 clear days from the day they were seized. See *O'Neil v. City & County Finance Co.*, 17 Q. B. D. 234. The section is for the benefit of the grantor of the bill of sale only, and a third person cannot sue the grantee for breach of the provision. *Tomlinson v. Consolidated Credit, &c. Co.*, 24 Q. B. D. 135, C. A.

Sect. 14, *ante*, p. 1198, applies only where a distress has been levied for rates, &c., and not to an execution on a judgment for them. *Wimbledon Local Board v. Underwood*, (1892) 1 Q. B. 836.

The B. of S. Act, 1878, did not apply to the debentures of a company, registered under the Companies Act, 1862; had it done so, the B. of S. Act, 1882, s. 17, would have removed them from its operation. *Reed v. Joannon*, 25 Q. B. D. 300; *In re Standard Manufacturing Co.*, (1891) 1 Ch. 627, C. A. The section applies to all incorporated companies, provision for the registration of the debentures of which is made by statute. S. C.; *Levy v. Abercorris Slate, &c. Co.*, 37 Ch. D. 260. *Secus*, in the case of companies where no such provision is made. *Gt. N. Ry. Co. v. Coal Co-operative Co.*, (1896) 1 Ch. 187. A debenture in sect. 17 "means a document which either creates a debt or acknowledges it." *Levy v. Abercorris Slate Co.*, *supra*; *Edmonds v. Blaine Furnaces Co.*, 36 Ch. D. 215. It need not consist of more than one document. S. CC. Where the property of a company was assigned to E., as trustee for the debenture holders, by an indenture registered as a bill of sale, and P. held a debenture in the form of an undertaking by the company, to pay the bearer 100*l.*, subject to the conditions indorsed, one of which was that the holders of the debenture were entitled *pari passu*

to the benefit of the indenture, whereby the freehold premises of the company and the machinery and furniture of the company in or about the same were expressed to be vested in trust to secure the payment of all moneys payable on such debentures. It was held that, assuming the indenture or "covering deed" to be void, the debenture gave a valid equitable charge within sect. 17, *ante*, p. 1198. *Ross v. Army & Navy Hotel Co.*, 34 Ch. D. 43, C. A. A covering deed is not within sect. 17; see *Richards v. Kidderminster*, (1896) 2 Ch. 212. As to the registration of the debentures of a company now, see the Cos. Act, 1900, s. 14, *infra*.

Where, under a bill of sale, the principal and interest are payable by equal instalments, the lender may insist on repayment in this way; if, however, he realise the security, he is entitled to interest to the date only of his receiving the principal. *West v. Diprose*, (1900) 1 Ch. 337, 339. So where the goods are sold under an interpleader order. *Forster v. Clowser*, (1897) 2 Q. B. 362, C. A.

As to the stamping of a bill of sale, *vide ante*, pp. 246, 262 *et seq.*

Mortgages Charges, &c., under Companies Act, 1890.] By the Cos. Act, 1900, (63 & 64 V. c. 48), s. 14 (1). "Every mortgage or charge created by a company after" Jan. 1st, 1901, "and being either: (a) a mortgage or charge for the purpose of securing any issue of debentures; or (b) a mortgage or charge on uncalled capital of the company; or (c) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or (d) a floating charge on the undertaking or property of the company, shall so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless filed with the registrar for registration in manner required by this act within 21 days after the date of its creation but without prejudice to any contract or obligation for repayment of the money thereby secured." See *Cornbrook Brewery Co. v. Law Debenture Cor.*, (1904) 1 Ch. 103; *In re N. Defries & Co.* *Id.* 37.

(4) "Provided that where a series of debentures containing any charge to the benefit of which the debenture holders of that series are entitled *pari passu* is created by a company, it shall be sufficient to enter on the register: (a) the total amount secured by the whole series; and (b) the dates of the resolutions creating the series and of the covering deed, if any, by which the security is created or defined; and (c) a general description of the property charged, and (d) the names of the trustees, if any, for the debenture holders." See *In re Harrogate Estates*, (1903) 1 Ch. 498. Where a series of debentures was created in 1900, and some of them were issued in 1900, and the rest after Jan. 1st, 1901, no registration is required. *In re Spiral Globe*, (1902) 2 Ch. 209.

(6) "The registrar shall give a certificate under his hand of the registration of any mortgage or charge registered in pursuance of this section, stating the amount thereby secured (which certificate shall be conclusive evidence that the requirements of this section as to registration have been complied with), . . ."

A charge "is a floating charge: (1) If it is a charge on a class of assets of a company present and future; (2) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and (3) if you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with." *In re Yorkshire Woolcombers' Assoc.*, (1903) 2 Ch. 284, 295, *per* Romer, L.J.; affirm in *D. P. sub. nom.*

Illingworth v. Houldsworth, (1904) A. C. 355. See also *Government Stock, &c. Investment Co. v. Manila Ry. Co.*, (1897) A. C. 81, 86, *per* *Ld. Macnaghten*. As to the issue of debentures duly registered in pursuance of an unregistered agreement, see *In re Jackson & Bassford*, (1906) 2 Ch. 467.

By sect. 15, a judge has power under certain circumstances to extend the time for registration or to order an omission or misstatement of any particular with respect to the mortgage or charge to be rectified, on such terms and conditions as seem to him just and expedient. See *In re Joplin Brewery Co.*, (1902) 1 Ch. 79; *In re Johnson (I.C.) & Co.*, (1902) 2 Ch. 101, C. A.; *In re Anglo-Oriental Carpet, &c. Co.*, (1903) 1 Ch. 914.

Deeds of arrangement.] The Deeds of Arrangement Act, 1887 (50 & 51 V. c. 57), provides for the registration of such deeds as are not made under the bankruptcy laws.

By sect. 4 (2.) "A deed of arrangement" . . . "shall include any of the following instruments, whether under seal or not, made by, for, or in respect of the affairs of a debtor for the benefit of his creditors generally (otherwise than in pursuance of the law for the time being in force relating to bankruptcy), that is to say:—(a) an assignment of property; (b) a deed of or agreement for a composition; And in cases where creditors of a debtor obtain any control over his property or business: (c) a deed of inspectorship entered into for the purpose of carrying on or winding up a business; (d) a letter of licence authorizing the debtor or any other person to manage, carry on, realize, or dispose of a business, with a view to the payment of debts; and (e) any agreement or instrument entered into for the purpose of carrying on or winding up the debtor's business, or authorizing the debtor or any other person to manage, carry on, realize, or dispose of the debtor's business, with a view to the payment of his debts."

By sect. 5. "From and after the commencement of this Act a deed of arrangement to which this Act applies shall be void unless the same shall have been registered under this Act within seven clear days after the first execution thereof by the debtor or any creditor, or if it is executed in any place out of England or Ireland respectively, then within seven clear days after the time at which it would, in the ordinary course of post, arrive in England or Ireland respectively, if posted within one week after the execution thereof, and unless the same shall bear such ordinary and *ad valorem* stamp as is under this Act provided."

By sect. 6. "The registration of a deed of arrangement under this Act shall be effected in the following manner:—(1.) A true copy of the deed, and of every schedule or inventory thereto annexed, or therein referred to, shall be presented to and filed with the registrar within seven clear days after the execution of the said deed (in like manner as a bill of sale given by way of security for the payment of money is now required to be filed)," *vide ante*, p. 1194, "together with an affidavit verifying the time of execution, and containing a description of the residence and occupation of the debtor, and of the place or places where his business is carried on, and an affidavit by the debtor stating the total estimated amount of property and liabilities included under the deed, the total amount of the composition (if any) payable thereunder, and the names and addresses of his creditors; (2.) No deed shall be registered under this Act unless the original of such deed, duly stamped with the proper inland revenue duty, and in addition to such duty a stamp denoting a duty computed at the rate of 1s. for every 100*l.* or fraction of 100*l.* of the sworn value of the property passing, or (where no property passes under the deed) the amount of composition payable under the deed, is produced to the registrar at the time of such registration."

By sect. 7, the registrar shall keep a register wherein shall be entered an

abstract of the contents of every deed of arrangement registered under this Act, containing certain particulars.

By sect. 8 (1.) The registrar of bills of sale shall be the registrar for the purposes of this Act; and (2.) the Bills of Sale Department of the Central Office of the Supreme Court of Judicature shall be the office for the registration of deeds of arrangement.

By sect. 9, the court or a judge have power under certain circumstances to extend the time for registration, or order an omission or mis-statement to be supplied or rectified by the insertion in the register of the true name, residence, or description.

By sect. 10. "When the time for registering a deed of arrangement expires on a Sunday, or other day on which the registration office is closed, the registration shall be valid if made on the next following day on which the office is open."

Sect. 11 provides that an office copy of, or extract from, any deed registered under this Act may be obtained, and enacts that "any copy or extract purporting to be an office copy or extract shall, in all courts and before all arbitrators or other persons, be admitted as *prima facie* evidence thereof, and of the fact and date of registration as shown thereon."

By sect. 17. "Nothing contained in this Act shall be construed to repeal or shall affect any provision of the law for the time being in force in relation to bankruptcy, or shall give validity to any deed or instrument which by law is an act of bankruptcy, or void or voidable."

By sect. 18.—"(1.) Rules for carrying this Act into effect may be made, revoked, and altered from time to time by the like persons and in the like manner in which rules may be made under and for the purposes of the Supreme Court of Judicature Acts, 1873 to 1884."

By sect. 19. "In this Act, unless the context otherwise requires,—'court or a judge' means the High Court of Justice and any judge thereof; 'creditors generally' includes all creditors who may assent or take the benefit of a deed of arrangement; 'person' includes a body of persons corporate or unincorporate; 'prescribed' means prescribed by rules to be made under this Act; 'property' has the same meaning as the same expression has in the Bankruptcy Act, 1883; 'rules' includes forms."

By a deed of arrangement a debtor assigned all his property to trustees for his creditors' benefit, all the acceding creditors being made parties thereto; it was executed by the debtor, the trustee, and one creditor, and registered under this Act, a copy of the deed in its then state being filed; afterwards six other creditors executed the deed. It was held that such execution did not alter the deed so as to affect it, or avoid the registration, and that sect. 6 (1) was satisfied as a true copy of the deed at the time of its registration had been filed. *Ex pte. Milne*, 22 Q. B. D. 685, C. A. The honest omission of the name and address of a creditor from the debtor's affidavit under sect. 6 (1) does not avoid the deed. *Maskelyne, &c. v. Smith*, (1903) 1 K. B. 671, C. A. A deed of assignment for specified creditors only, without an option to other creditors to come in, is not within the act, nor requires registration. *Ex pte. Salaman*, (1907) 2 K. B. 170, C. A. A deed of assignment by a foreign debtor D., for the benefit of his creditors, executed in the country of his domicile, and valid by the law of that country, of D.'s goods in this country, is effective here without registration. *Dulaney v. Merry*, (1901) 1 K. B. 536. As to proof of the registered deed, see sects. 7, 11, *supra*, and cases cited *ante*, p. 1209, relating to bills of sale. The Act does not apply to companies registered under the Companies Act, 1862. *In re Rileys*, (1903) 2 Ch. 590.

2. Action for taking goods in execution without paying rent due.

By 8 A. c. 18 (c. 14, Ruff.), s. 1, no goods or chattels in or upon any messuage, lands, or tenements leased for life or lives, term of years, at will or otherwise, shall be liable to be taken in execution, unless the party, at whose suit the execution is sued out, shall, before the removal of such goods from off the premises, pay to the landlord, or his bailiff, all such sums of money as are due for rent for the premises, at the time of the taking of the goods, provided the said arrears of rent do not amount to more than one year's rent; and in case the arrears shall exceed one year's rent, then the party at whose suit the execution is sued out, paying the landlord, &c. one year's rent, may proceed to execute judgment; and the sheriff is empowered and required to levy and pay to the plaintiff as well the money paid for rent as the execution money. As to the duty of the sheriff under this act, see *Cocker v. Musgrove*, 9 Q. B. 223, cited *post*, p. 1222, and *Ex pte. Sheriff of Herts*, (1899) 2 Q. B. 566, 573, *per* C. A. If the agent of the landlord take from the sheriff's officer an undertaking to pay the year's rent, and consent to the sale, the landlord cannot afterwards maintain an action on the statute, though the rent be not paid pursuant to the undertaking, and though the undertaking be void by the Stat. of Frauds. *Rothery v. Wood*, 3 Camp. 24.

By 7 & 8 V. c. 96, s. 67, "no landlord of any tenement, let at a weekly rent, shall have any claim or lien upon any goods taken in execution under the process of any court of law for more than four weeks' arrears of rent; and if such tenement shall be let for any other term less than a year, the landlord shall not have any claim or lien on such goods for more than the arrears of rent accruing during four such terms or times of payment."

By 51 & 52 V. c. 43, s. 160 (replacing 19 & 20 V. c. 108, s. 75), the stat. 8 A. c. 18, s. 1, is not to apply to executions levied under warrant of the county court; but when goods, in a tenement for which rent is due, are taken in execution under such process, the landlord may claim the rent due to him by delivering notice to the bailiff making the levy, and such bailiff shall in making the levy, in addition thereto, distrain for the rent so claimed, and shall, after satisfying the costs of and incident to the sale, pay over to the landlord the amount of rent due, not exceeding four weeks where the tenancy is weekly, the rent of two terms where the tenancy is for any other term less than a year, and the rent of one year in any other case. This provision applies only to goods lawfully taken in execution, and therefore not to the goods of a stranger upon the demised premises. *Beard v. Knight*, 8 E. & B. 865; 27 L. J., Q. B. 359; *Foulger v. Taylor*, 5 H. & N. 202; 29 L. J., Ex. 154. It applies, however, where the goods of the judgment debtor are seized on premises of which he is not tenant. *Hughes v. Smallwood*, 25 Q. B. D. 306.

Some local acts impose on the sheriff an analogous duty as to the payment of parish rates, due in respect of the premises on which the levy is made. See *S. Marylebone Vestry v. Sheriff of London*, (1900) 2 Q. B. 594, C. A.

The plaintiff in this action may be called upon to prove, 1, the demise and the rent in arrear; 2, the seizure of the goods under the execution; 3, notice to the sheriff; 4, the removal of the goods without satisfying the rent; and 5, the value of the goods.

Evidence of the demise, &c.] There must be a subsisting tenancy at a rent certain; therefore mere proof of occupation under an agreement for a future lease, without payment of rent is not sufficient; *Riseley v. Ryle*, 11 M. & W. 16; nor is it sufficient that the execution was levied within six

months after the expiration of a tenancy, so that the landlord could have distrained under 8 A. c. 18, ss. 6, 7; *Cox v. Leigh*, L. R., 9 Q. B. 333. The statement of claim need not state the particulars of the demise; but if stated, they ought to be proved as laid. *Bristow v. Wright*, 2 Doug. 665. As to proof of the tenancy, see *ante*, pp. 334, 1009, 1082. In order to prove the rent in arrear, it will, for a *prima facie* case, be sufficient to show the occupation by the tenant and the amount of the rent. *Harrison v. Barry*, 7 Price, 690. A demise from a lessee to an under-tenant is within the stat. 8 A. c. 18, s. 1. *Thurgood v. Richardson*, 7 Bing. 428.

The trustee of an outstanding satisfied term, held in trust to attend the inheritance, is a "landlord" within the statute. *Colyer v. Speer*, 2 B. & B. 67. The action may be brought by an executor or administrator. *Palgrave v. Windham*, Stra. 212. On a sale of premises it was stipulated that, from the time of the vendee taking possession until the completion of the purchase, he should pay to the vendor at the rate of 100*l.* *per annum*; held that this was "rent" within the stat. 8 A. c. 18, s. 1. *Saunders v. Musgrave*, 6 B. & C. 524.

The plaintiff can only recover the rent due at the time of the taking the goods. *Hoskins v. Knight*, 1 M. & S. 245. And, it seems that he cannot demand rent for a byegone year after the commencement of a fresh tenancy on different terms. *Cook v. Cook*, Andrews, 217.

Evidence of the levy.] As to the mode of proving connection between the sheriff and the officer, see *Reed v. Thoyts*, 6 M. & W. 410, and other cases cited *ante*, pp. 1185 *et seq.*, and *post*, p. 1224.

Evidence of notice.] In order to render the sheriff liable as a wrongdoer by the removal of the goods, it must be proved that he had notice of the landlord's claim. *Arnitt v. Garnett*, 3 B. & A. 441; *Smith v. Russell*, 3 Taunt. 400. It is not necessary to prove a formal notice; if it can be shown that the sheriff or his officer knew, previously to the removal of the goods, that there was rent due to the landlord, it will be sufficient. *Riseley v. Ryle*, 11 M. & W. 20, *per Parke, B.*; *Andrews v. Dixon*, 3 B. & A. 645. Notice to the creditor is not necessary. *Riseley v. Ryle*, 11 M. & W. 16.

Removal of the goods.] It is enough to show that some goods were removed: and the plaintiff need not show that enough to satisfy the rent was not left. *Colyer v. Speer*, *supra*. It is said that the goods need not be distrainable goods. *Riseley v. Ryle*, 11 M. & W. 22. See also *Cox v. Leigh*, *supra*. A mere sale, without more, is not equivalent to removal. *Wharton v. Naylor*, 12 Q. B. 673; *Smallman v. Pollard*, 6 M. & Gr. 1001.

Damages.] If the sheriff sell before the rent is paid, he is *prima facie* liable to pay the whole rent due. *Thomas v. Mirchouse*, 19 Q. B. D. 563, C. A. But he may "show in mitigation of damages that the value of the goods removed was not sufficient to pay the rent. In such case the loss to the landlord by the removal of the goods, or, in other words, their value to him at the time of the removal, becomes the measure of damages." S. C., *Id.* 566. But the jury are not confined to the precise amount produced on the sale by the sheriff; the plaintiff may insist that if the defendant had proceeded regularly, the whole would have been paid, or, may show that the goods sold badly. *Per Taunton, J.*, *Foster v. Hilton*, 1 Dowl. 35, 38. And, *per Parke, J.*, *Culvert v. Joliffe*, 2 B. & Ad. 418, 422, the jury are not bound to give so much as the sale price.

3. *Action for not paying over money levied.*

An action for money had and received lies against a sheriff for not paying over to the plaintiff money levied under an execution in an action at his suit; see *Morland v. Pallatt*, 8 B. & C. 722, *per* Littledale, J.; *accord. Bower v. Hett*, (1895) 2 Q. B. 56 *per* Ld. Russell, C.J. In such action the plaintiff must prove the writ of execution, and the levy under it.

The issuing of the *fi. fa.* at the suit of the plaintiff must be proved: for which purpose proof of the defendant's warrant, reciting the writ, will be sufficient. *Wilson v. Norman*, 1 Esq. 154. As to proof of the warrant under the defendant's seal of office, see *ante*, p. 1185. An examined copy of the writ and return will prove the writ, the levy, and the return; and no prior demand is necessary. *Dale v. Birch*, 3 Camp. 347. A letter written by the under-sheriff is also evidence to fix the defendant; *Haynes v. Hayton*, cited 6 Q. B. 169; but the statements of the writer are thereby made evidence for the defendant. S. C. See further as to proof of writs, &c. *ante*, pp. 110, 1185 *et seq.*, and *infra*.

It is not sufficient to prove the taking and selling of the goods by a person reputed to be an officer of the sheriff, without proof of the writ of execution or warrant. *Wilson v. Norman*, *supra*. The defendant may deduct his poundage; *Longdill v. Jones*, 1 Stark. 346; as to which *vide post*, p. 1224. It has been doubted whether this action can be maintained before the return-day of the writ. *Per* Parke, J., in *Morland v. Pellatt*, 8 B. & C. 727. In *Cockram v. Welbye*, 2 Show. 79; *Freem.* 236, it was held that debt lay, though the writ had not been returned.

Where a sheriff returned that he had seized goods under a *fi. fa.*, had sold part, and that the residue remained in his hands for want of buyers, it was held a defence to an action against him for the amount levied, that the defendant in the original action was in fact a bankrupt at the time of the seizure and sale, and that the goods belonged to his assignees. *Brydges v. Walford*, 6 M. & S. 42. See *Tomlinson v. Shynn*, 2 B. & B. 77. So, where the plaintiff had appointed a special bailiff and agent to manage the sale of goods under a *fi. fa.*, it was held that the sheriff was discharged; although on being ruled to return the writ, he returned that he had sold, and that he had made deductions, which he had no right to make in point of law. *Pallister v. Pallister*, Tidd, 9th ed. 1019; 1 Chitty, 614, n.; *Higgins v. M'Adam*, 3 Y. & J. 1.

The action lies against an under-sheriff, B., or his executors, where B. acted as sheriff under 50 & 51 V. c. 55, s. 28, on the death of the sheriff A., and B. received the proceeds of the levy after A.'s death. *Gloucestershire Banking Co. v. Edwards*, 19 Q. B. D. 575; 20 *Id.* 107, C. A.

4. *Action for not levying, and for false return on final process.*

In an action against a sheriff for a false return to final process, the plaintiff must prove, if those facts are denied on the pleadings, 1, the judgment; 2, the writ and endorsement, and the return; 3, the falsehood of the return.

As to the mode of proving the judgment, and as to the writ, and return, see *ante*, pp. 108, 110, 111.

The judgment is mere inducement. *Stoddart v. Palmer*, 2 B. & C. 2. The untrue return is the ground of action, though the injury to the plaintiff is founded on the right to recover on the judgment.

It is not necessary to prove an actual levy after seizure under a *fi. fa.* *Stubbs v. Lainson*, 1 M. & W. 728.

It may be observed that by the Bky. Act, 1883, s. 146 (1), "the sheriff shall not under a writ of *elegit* deliver the goods of a debtor, nor shall a writ of *elegit* extend to goods." (2) "No writ of *levari facias* shall hereafter be issued in any civil proceeding," and by sect. 168, "goods" include all chattels personal.

Evidence to disprove the return.] The plaintiff must prove the falsehood of the return. Thus, in an action for a false return of *nulla bona*, he must show that the party had goods within the bailiwick of which the sheriff had notice, or might, by using due diligence, have had notice. The principle of the following cases, decided on the question of the sheriff's liability to the plaintiff for not arresting his debtor on mesne process, seems applicable to an action against him for a false return on a *fi. fa.* If a person, against whom the sheriff had a *capias*, did not abscond, but continued in the daily exercise of his usual occupation, appeared publicly, and was visible to every one that came to him on business, and the bailiff, neglecting to arrest him, returned *non est inventus*, it was proof of a false return. *Beckford v. Montague*, 2 Esp. 475. It was ruled not sufficient merely to prove that the debtor was within the defendant's bailiwick, but the plaintiff ought to have proved notice of it to the under-sheriff, or to the bailiff to whom the warrant was directed. *Gibbon v. Coggon*, 2 Camp. 189. But, it did not appear that the plaintiff was bound to give this notice to the sheriff; for the latter was to make due inquiries for the purpose of finding the debtor. *Dyke v. Duke*, 4 N. C. 197; *accord. Brown v. Jarvis*, 1 M. & W. 704, 713. He was bound to execute and to return the writ as soon as he could. S. C.; *Randell v. Wheble*, 10 Ad. & E. 719.

In an action for a false return of *nulla bona* to a *fi. fa.* against the goods of A. and B., the plaintiff must have a verdict if he prove that either had goods. *Jones v. Clayton*, 4 M. & S. 349.

The declarations of the sheriff's officer respecting goods seized by him under a *fi. fa.*, and in his possession at the time, are evidence against the sheriff, though made after the return day of the writ. *Jacobs v. Humphrey*, 2 Cr. & M. 413; *ante*, p. 1186.

Damages.] No action can be maintained for a false return to a writ of *fi. fa.* if it be shown that the plaintiff can have sustained no damage; *vide infra*. So although *primâ facie*, the measure of damage is the value of the goods on which the execution might have been and was not levied, yet it is for the jury to say, looking at all the probabilities of the case, whether or not, if the execution had been levied, the plaintiff would have derived any benefit from it by reason of the other creditors of the execution debtor being in a position to make him bankrupt, and if he would not, the defendant is entitled to the verdict. *Hobson v. Thelluson*, L. R. 2 Q. B. 642. Where the sheriff is sued for returning *nulla bona*, instead of levying on certain property which belonged jointly to the debtor and to another, the proper measure of damage is half the value of the goods. *Tyler v. Leeds*, *Dk. of*, 2 Stark. 218.

Defence.

In an action for a false return to a writ of *fi. fa.* the defendant is entitled to a verdict, if the plaintiff have sustained no damage, as where the debtor had become bankrupt: *Wylie v. Birch*, 4 Q. B. 506; or, where the rent exceeding the amount in the sheriff's hands, is due on the premises, which was required by the stat. 8 A. c. 18, *ante*, p. 1218, to be paid out of the levy;

Levy v. Hale, 29 L. J., C. P. 127; or where the goods seized had been previously assigned by the debtor under a valid bill of sale; *Stimson v. Farnham*, L. R., 7 Q. B. 175; even although the bill of sale was by way of mortgage only, and for an amount less than the value of the goods: for the discretionary power vested in a judge to order a sale in such case, by Rules, 1883, O. lviii., r. 12, does not enlarge the powers of the sheriff as to seizure. *Scarlett v. Hanson*, 12 Q. B. D. 213, C. A., decided under the C. L. P. Act, 1860, s. 13, which was similar in its terms. If the goods seized under *fi. fa.* are exhausted by payment of landlord's rent, expenses, and the sum due on a prior writ, the return of *nulla bona* is proper. *Wintle v. Freeman*, 11 Ad. & E. 539. It is to be observed that "the execution creditor takes subject to all the equities," *vide post*, p. 1226.

The insufficiency of the goods to satisfy prior claims will entitle the defendant to a verdict under a traverse of the alleged levy. *Heenan v. Evans*, 3 M. & Gr. 398. As to extent for a Crown debt, though tested after delivery of the *fi. fa.* to the sheriff has priority over the latter, unless the sale has taken place under the *fi. fa.* *R. v. Wells*, 16 East, 278, n. See also *Att.-Gen. v. Leonard*, 38 Ch. D. 622. The plaintiff may show that a judgment, in respect of which a prior writ issued, is fraudulent; *Imray v. Magnay*, 11 M. & W. 267; and it is not necessary to prove that the sheriff had notice of the fraud, for he is bound to execute the plaintiff's writ at his peril. *Dennis v. Whitham*, L. R., 9 Q. B. 345. The debtor's conduct as to the execution of the prior writ is admissible evidence of fraud. *Imray v. Magnay*, *supra*. The plaintiff may show that the prior writ was delivered with directions not to proceed on it till orders. *Hunt v. Hooper*, 12 M. & W. 664. Where the defendant proves that the goods in question were assigned before the execution, under a bill of sale (*vide Stimson v. Farnham*, *supra*), the plaintiff may, in reply, show the assignment to have been fraudulent. *Dewey v. Bayntun*, 6 East, 257. As to which, see cases, *ante*, pp. 1190 *et seq.* Where there are prior writs and also rent due, the sheriff may traverse the existence of any goods on which he could levy, although the goods would have satisfied all if sold; for he cannot lawfully levy and sell until some of the creditors have paid the rent. In this case the sheriff's return was agreeable to the facts, and the plea denied any goods on which defendant could levy besides goods sufficient to satisfy the prior writs and rent; and *per cur.*, the sheriff is not bound to advance the rent: and, "until paid there are no goods out of which he is bound to levy, *i.e.*, to sell." *Cocker v. Musgrove*, 9 Q. B. 223. See also *Levy v. Hale*, *supra*. The sheriff is not estopped from denying his own return, for the purpose of showing that the plaintiff can have sustained no damage from its falseness, and so that the plaintiff has no cause of action. *Remmett v. Lawrence*, 15 Q. B. 1004; 20 L. J., Q. B. 25; *Levy v. Hale*, and *Stimson v. Farnham*, *supra*.

Where, in an action for a false return of *nulla bona* to a writ of *fi. fa.*, the defence is that the party against whom the writ issued has become bankrupt, the bankruptcy must be regularly proved. B. N. P. 51; and see *Dowden v. Fowle*, 4 Camp. 38. And where the defence is that the landlord of the debtor claimed the goods for rent, the defendant cannot prove the claim by the oral testimony of the landlord, if his tenant held under a written lease. *Augustien v. Challis*, 1 Exch. 279.

When the defence is payment of rent to the landlord, some evidence, however slight, must be given of the rent being due. *Keightley v. Birch*, 3 Camp. 521. The sheriff returned *nulla bona* after satisfying the landlord's claim for rent and the king's taxes, and the plaintiff assented to his quitting possession of the premises and sued out a *ca. sa.*: it was held that he could not afterwards maintain an action for a false return to the *fi. fa.*, however

unfounded the claim for rent might turn out to be. *Stuart v. Whittaker*, Ry. & M. 310.

As to the duty of a sheriff on whom, after levy and before sale, notice has been served that a receiving order has been made against the debtor, or who has levied on a judgment for a sum exceeding 20*l.*, see the Bky. Act, 1883, s. 46 (1), and the Bky. Act, 1890, s. 11. By the Bky. Act, 1883, s. 145, "Where the sheriff sells the goods of a debtor under an execution for a sum exceeding 20*l.* (including legal incidental expenses), the sale shall, unless the court from which the process issued otherwise orders, be made by public auction, and not by bill of sale or private contract, and shall be publicly advertised by the sheriff on and during three days next preceding the day of sale." The court may, under this section, order a private sale, on the *ex parte* application of the judgment creditor: *Hunt v. Fensham*, 12 Q. B. D. 162; so may a master at chambers. *Hunt v. Clifford*, W. N. 1884, p. 86, Field, J. A private sale, however, made without such order, but with the consent of the debtor is irregular only, and until set aside by the court, is valid against a subsequent execution creditor. *Crawshaw v. Harrison*, (1894) 1 Q. B. 79.

The defendant may show that the judgment, on which the writ issued, was fraudulent and void, and that he paid the proceeds of the execution to another creditor, although under a writ dated subsequently to the plaintiff's writ. *Shattock v. Carden*, 6 Exch. 725; 21 L. J., Ex. 200. See also *Lane v. Chapman*, 11 Ad. & E. 966. But it must be a clear case of fraud and collusion to avoid a judgment, so as to let in this defence. *Tyler v. Leeds*, *Dk. of*, 2 Stark. 221; *Harrod v. Benton*, 8 B. & C. 219. The defendant cannot impeach the judgment on the ground of a collateral fraud. *Inmy v. Magnay*, 11 M. & W. 277, *per cur.*; *Christopherson v. Burton*, 3 Exch. 162.

The defendant cannot give in evidence, even in mitigation of damages, an inquisition held by him to inquire into the property of the goods, under which they were found not to be the property of the debtor. *Glossop v. Pole*, 3 M. & S. 175.

5. Action for extortion.

The evidence in this action depends entirely on the allegations in the statements of claim and defence.

The fees to which a sheriff is entitled are now regulated by the Sheriffs Act, 1887, s. 20. Sub-sect. 1 fixes his allowance in the case of sums collected by him for the Crown. By sub-sect. 2, in the execution of other process the sheriff or sheriff's officer is entitled to such fees and poundage as may be fixed by the L. C., with the advice and consent of the L. JJ. and J.J. or any three of them, and with the concurrence of the Treasury. A table of fees made under this provision, dated Aug. 31st, 1888, will be found in W. N. 1888, Pt. II. p. 441. A remedy against extortion by the sheriff is provided by sect. 29, which provides, by sub-sect. (2), that "if any person being either a sheriff, under-sheriff, bailiff, or officer of a sheriff, or being employed in levying or collecting debts due to the Crown by process of any court, or being an officer to whom the return or execution of writs belongs, does any of the following things, that is to say—(a) withholds a prisoner bailable after he has offered sufficient security; or (b) takes or demands any money or reward under any pretext whatever, other than the fees or sums allowed by or in pursuance of this or any other Act; or (c) grants a warrant for the execution of any writ before he has actually received that writ; or (d) is guilty of any offence against or breach of the provisions of this Act, or of any wrongful act or neglect or default in the execution of his office, or of any contempt of any superior court; he and any person procuring the commission

of any such offence shall, without prejudice to any other punishment under the provisions of this Act, but subject as hereinafter mentioned, be liable" . . . "(ii.) to forfeit 200*l.*, and to pay all damages suffered to any person aggrieved, and such forfeiture and damages may be recovered by such person as a debt by an action in H. M. High Court of Justice." (7) "Any proceeding in pursuance of this section against a sheriff, under-sheriff, or any other person to whom this section applies, shall be taken within two years after the alleged offence was committed, and not subsequently."

The party upon whom the extortion is committed may maintain an action for money had and received against the sheriff; and in such an action, it is not necessary to prove a tender of the sum actually due. *Scarfe v. Halifax*, 7 M. & W. 288.

The mode in which the issuing of a *fi. fa.*, and the connection between the sheriff and the bailiff may be proved, has been already stated, *ante*, pp. 1185 *et seq.* If the sheriff have returned to the writ that he has caused to be levied, &c., it will be evidence that he has adopted the act of the bailiff as his own. *Woodgate v. Knatchbull*, 2 T. R. 154. It must appear that the sheriff intrusted the bailiff with his authority in the particular case in which the latter has abused it, and, therefore, if the extortion be committed by an officer not named in the warrant, to whose house the plaintiff had been carried, the sheriff is not liable. *George v. Perring*, 4 Esp. 63. So, where a writ is directed to the coroner, though it is executed by an officer of the sheriff, the latter is not liable. *Sarjeant v. Cowan*, 1 Cr. & M. 491.

Where the money levied is not sufficient to satisfy the plaintiff's claim, the retaining of any part which ought to be paid over to the plaintiff, is an indirect taking from him within sect. 29 (2) (b), *ante*, p. 1223. See *Buckle v. Bewes*, 3 B. & C. 688, decided on stat. 29 El. c. 4.

The sheriff is not entitled to poundage, nor his officer to fees, unless there has been a levy; *i.e.* a seizure of goods, resulting in money being thereby obtained, either by their sale, or by payment; *Lee v. Dangar*, *infra*; the mere production, however, of the warrant, and a demand of the debt and costs and expenses of levy, on the premises where the execution debtor's goods are, and payment thereupon by him of the amount constitute a levy. *Bissicks v. Bath Colliery Co.*, 2 Ex. D. 459; 3 Ex. D. 174, C. A. And where there has been a levy, the sheriff is entitled to poundage, although there has been no sale. S. C.; *Mortimer v. Cragg*, 3 C. P. D. 216, C. A.

Where a receiving order in bankruptcy is made against the execution debtor, after the sheriff has seized his goods, and before sale thereof, the right of the sheriff to his costs of execution is reserved to him by the Bky. Act, 1883, s. 46 (1), and Bky. Act, 1890, s. 11. These costs do not include poundage. *In re Ludmore*, 13 Q. B. D. 415. In *Miles v. Harris*, 12 C. B., N. S. 550; 31 L. J., C. P. 361, the bailiff, after having been two days in possession, withdrew on discovering that the judgment had been irregularly signed, and it was subsequently set aside: the sheriff was held not entitled to poundage. It seems that the sheriff is now entitled by these sections to charge for the cost of advertisements directed by sect. 145 (*vide ante*, p. 1223), of the sale by auction of the debtor's effects. Under the Bky. Act, 1861, ss. 73, 74, it was otherwise, for the former of these sections was limited to the case of bankruptcy. *Braithwaite v. Marriott*, 1 H. & C. 591; 32 J. L. Ex. 24.

The sheriff's officer is not liable to the penalty under sect. 29 (2) (b) and (ii) unless he has a *mens rea*; thus he is not liable where he has remained in possession for a day too long, under a mistake as to fees payable to him under the Table. *Lee v. Dangar*, (1892) 2 Q. B. 337, C. A.; affirming S. C., (1892) 1 Q. B. 231; nor where *3*l.** too much was demanded and required for poundage, owing to a clerical error. *Shoppee v. Nathan*, *Id.* 215; nor where, after sale an account is sent in, by the officer, to the official

receiver in bankruptcy of the execution creditor, containing claims for deductions from the proceeds of the sale, to a much larger amount than allowed, such account being subject to taxation. *Woolford's Estate, Trustee of v. Levy*, *Id.* 772, C. A. The person actually guilty of the wrongful act is alone liable to the penalty; thus the sheriff is not liable to it where his bailiff has seized goods under a *fi. fa.*, without excepting wearing apparel, &c., to the value of 5*l.* as required by 8 & 9 V. c. 127, s. 8. *Bagge v. Whitehead*, (1892) 2 Q. B. 355, C. A.

See further, as to the sheriff's fees, *Smith v. Broadbent*, (1892) 1 Q. B. 551, and *Glasbrook v. David*, (1905) 1 K. B. 615, cited *ante*, p. 585.

As to action against sheriff for false return of a rescue, whereby the plaintiff was attached, see *Brasger v. Maclean*, L. R., 6 P. C. 398.

ACTIONS BY AND AGAINST SOLICITORS.

See *ante*, pp. 500, 509.

ACTIONS BY SURGEONS OR OTHER MEDICAL PRACTITIONERS.

See *ante*, pp. 512 *et seq.*

ISSUES UPON INTERPLEADER ORDERS.

Rules, 1883, O. lviii., now replace the practice under 1 & 2 W. 4, c. 58; 1 & 2 V. c. 45, s. 2; and the Q. L. P. Act, 1860, as to interpleader. Issues on interpleader orders are now directed under O. lviii., r. 7. When obtained on the application of a sheriff, the claimant is commonly made the plaintiff, and is then entitled to begin on the trial, and the execution creditor the defendant. The evidence depends on the question to be tried.

It is generally desirable that objections which prevent the trial of the matter really in question should be waived at N. P., in order that all the information which it was the object of the issue to obtain may be supplied. The court, moreover, did not give effect to every technical objection as in an ordinary trial. *Waterton v. Baker*, *post*, p. 1227, *per* Blackburn, J.; *Gugen v. Sampson*, 4 F. & F. 974, *per* Channell, B., and see cases below. It has, however, been said more recently that there is now "no difference between the evidence received on the trial of an interpleader issue and in other cases," *per* Mellor, J., in *Emmott v. Marchant*, 3 Q. B. D. 556.

The following points have been ruled:—

Generally, the judgment creditor, who has seized under a *fi. fa.*, and is in possession when the claim is set up, has a *primâ facie* title, which the claimant must rebut, and the latter must therefore begin at the trial. *Edwards v. Matthews*, 4 D. & L. 721. In interpleader between one who claims as assignee of the judgment debtor and the judgment creditor, the admissions of the assignor, before the date of the assignment, that he

was indebted to the plaintiff (claimant), are not evidence for the plaintiff that the debt was a *bonâ fide* one. *Coole v. Braham*, 3 Exch. 183. The question on interpleader was, whether the plaintiff had any property in the goods as against the defendant, the execution creditor; held that, if the plaintiff had a lien on them against the original debtor, he maintained the issue. *Rogers v. Kenney*, 9 Q. B. 592. See also *Jennings v. Mather*, (1902) 1 K. B. 1 C. A. On an issue to try whether a firm consisting of the defendants were indebted to the plaintiff's firm, it was no objection at N. P. that some of the parties to the record are members of *both* firms, although in an *action* it would have been otherwise. *Bosanquet v. Woodford*, 5 Q. B. 310. So, even before the J. Act, 1873, on an interpleader issue the court considered the equitable rights of the parties; *Rusden v. Pope*, L. R., 3 Ex. 269; *Bank of Ireland v. Perry*, L. R., 7 Ex. 14; *Duncan v. Cushin*, L. R., 10 C. P. 554; *Engelbach v. Nixon*, *Id.* 645; and now under sect. 24, cited *ante*, pp. 306, 307, the court is to give effect to all equitable estates, interests, and principles, and "the execution creditor takes subject to all the equities." *In re Standard Manufacturing Co.*, (1891) 1 Ch. 627, 641, *per C. A.*; *Simultaneous Colour Printing Syndicate v. Poweraker*, (1901) 1 K. B. 771.

On an issue between an execution creditor and assignee in bankruptcy, stating the execution and the fiat, where the question was whether the execution was valid as against the fiat, the creditor was not permitted to dispute the bankruptcy. *Linnet v. Chaffers*, 4 Q. B. 762. But where the question was, whether the plaintiffs were entitled to the goods seized, as against, and free from, the defendant's execution, and whether they were liable to be seized as against the plaintiffs; the plaintiffs were put to strict proof of the bankruptcy. *Lott v. Melville*, 3 M. & Gr. 40.

The assignee, A., of a Lloyd's bond given by a railway company, sued the company in the name of the obligee, and compromised the action by taking an assignment of all the rolling stock of the company; another creditor, B., subsequently obtained judgment against the company, and took the rolling stock in execution; it was held, on an issue between A. and B., that B. could not dispute the original legality of the bond, and that the conveyance to A. was valid as against B. *Blackmore v. Yates*, L. R., 2 Ex. 225.

Where the trustees of the debtor's wife claimed the goods against an execution creditor, and the issue was, whether the goods belonged to the debtor or not, the trustees, who were parties to the issue as defendants, were not permitted to show that the debtor was a bankrupt, and that the goods vested in his assignees, who had not interfered or claimed them. *Carne v. Brice*, 7 M. & W. 183. Here the execution creditor was *primâ facie* entitled to the goods, and the title of the claimants was unconnected with that of the assignees. See also *Belcher v. Patten*, 6 C. B. 608. But where the claimant took under a conveyance by the debtor, which was alleged to be in itself void as an act of bankruptcy, the judgment creditor (defendant) was held entitled to show this, on issue joined as to the property of the claimants, in the goods seized under the *fi. fa.* *Chase v. Goble*, 2 M. & Gr. 930. So the execution creditor may defeat the claim by establishing a title to the goods in a third party, although superior even to his own. *Richards v. Jenkins*, 18 Q. B. D. 451, C. A. Thus he may set up the title of the trustee in bankruptcy of the claimant. *Id.* In this case the claimant had no title whatever. When the claimant is owner of an equity of redemption in the goods he is entitled to succeed. *Usher v. Martin*, 24 Q. B. D. 272.

By Rules, 1883, O. lvii., r. 3 (replacing the C. L. P. Act, 1860, s. 12), relief by way of interpleader may be granted although "the titles of the claimants have not a common origin, but are adverse to, and independent

of, one another." See as to the construction of this rule, *Meynell v. Angell*, 32 L. J., Q. B. 14; *Best v. Hayes*, 1 H. & C. 718; 32 L. J., Ex. 129; *Tanner v. European Bank*, L. R., 1 Ex. 261. Upon an interpleader issue whether certain goods seized in execution were "at the time of the seizure, the goods of the plaintiff," the plaintiff proved a bill of sale of the goods to himself; it was held that the defendant, the execution creditor, might set up, by way of answer, a prior bill of sale to a third party. *Gadsden v. Barrow*, 9 Exch. 514; 23 L. J., Ex. 131. But under the Bills of Sale Act, 1878, s. 8, the prior bill of sale, if unregistered, would be displaced, but so far only as is necessary to give effect to the execution: *Ex pte. Blaiberg*, 23 Ch. D. 251, C. A., *vide ante*, p. 1204; and if given as security for money would be void altogether under the Bills of Sale Act, 1882, s. 8, *ante*, p. 1197. If, however, the prior bill of sale were a deed of gift, it would, under *Id.*, s. 5, avoid the later bill of sale given as a security for money. *Tuck v. Southern Counties Deposit Bank*, *ante*, p. 1210. Where A. mortgaged his chattels to B., and they were taken in execution, at the suit of C., a creditor of A.: it was held that in an issue between B. and C., B. could not after the mortgage had been satisfied rely on his bare legal title to the chattels. *Waterton v. Baker*, 17 L. T. 491, H. T. 1868, Q. B. The execution creditor is not necessarily bound by an estoppel which would have prevented his debtor from disputing the title of the claimant. *Richards v. Johnston*, 4 H. & N. 660; 28 L. J., Ex. 322; *Richards v. Jenkins*, 18 Q. B. D. 451, C. A. In *Shingler v. Holt*, 7 H. & N. 65; 30 L. J., Ex. 322, the claimant was a married woman against whom a decree *nisi* for the dissolution of her marriage had been pronounced. An issue was directed as to whether the goods were, at the time of the delivery of the writ to the sheriff, the goods and chattels of S. S. (the maiden name of the plaintiff). The jury having found a verdict for the plaintiff, the court refused a new trial, or to enter into the question of the plaintiff's title, as a married woman against her husband. And see *Bird v. Crabb*, 30 L. J., Ex. 318; and *Duncan v. Cashin*, L. R., 10 C. P. 554.

As to what assignments are fraudulent, see *ante*, p. 1190.

As to the operation of the Bills of Sale Acts, *vide ante*, p. 1191.

APPENDIX.

Affidavit to put off trial on account of absence of material witness.
(See *Tidd's Forms*, 310; *Chitty's Forms*, 10th ed. 853.)

In the High Court of Justice,
King's Bench Division [*or other division*].

Between { *A. B.*, plaintiff,
 and
 C. D., defendant.

I, *C. D.*, the above-named defendant [*or Y. Z. of ———*, the solicitor in this action of the above-named defendant], make oath and say as follows :—

1. That issue was joined in this action on the ——— day of ——— and that notice for the trial thereof was given for the ——— day of ———.

2. That *E. F.*, late of ———, is a material and necessary witness for me [*or for the defendant*] in the said cause, as I am advised and believe that I cannot safely proceed to the trial thereof, without the testimony of the said *E. F.*

3. That the said *E. F.* is now at [*state the witness being abroad, if that be the fact*].

4. That in consequence of the notice of trial so given, as aforesaid, I caused an inquiry to be made, &c. [*stating the nature and result of the inquiry made after the witness, and the time when he is likely to attend, and other facts, if any, in support of the application*].

Sworn, &c.

C. D.
[*or Y. Z.*]

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